REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

ONTARIO,

BY

ALEXANDER GRANT, BARRISTER,
REPORTER TO THE COURT.

VOLUME XXIII.

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THE HON JOHN GODFREY SPRAGGE, *Chancellor.*

" SAMUEL HUME BLAKE, } *Vice-Chancellors.*
" WILLIAM PROUDFOOT, }

" OLIVER MOWAT, Q. C., *Attorney-General.*

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY,

OF

ONTARIO,

DURING PORTIONS OF THE YEARS 1875 AND 1876.

CORPORATION OF WHITBY v. LISCOMBE. [IN APPEAL.*]

Charitable bequest—Mortmain.

Held,—[Affirming the decree of Blake, V. C., as reported ante volume xxii., page 203,]—that the Statute of Mortmain, 9 Geo. II., ch. 36, is in force in this Province, and that a bequest to the Town of Whitby "for the purpose of establishing and maintaining, in the said Town of Whitby, a public library and mechanics' institute, to be dedicated to, and be under the control of the said corporation of the said Town of Whitby," and which bequest could only be paid out of moneys arising from the sale of lands or mortgages on lands. was void, under the Act, as a charitable bequest.

This was an appeal by the plaintiffs from the decree of *Blake*, *V. C.*, as reported ante volume xxii., page 203, where the facts sufficiently appear. Dec. 20, 1875

Mr. *Fitzgerald*, Q. C., and Mr. *A. Hoskin*, for the plaintiffs, contended that the Imperial Statute 9 George II. chapter 36 is not in force in the Province of Ontario. The Provincial Statute 32 George III. chapter 1 only introduced such laws of Great Britain relative to property and civil rights as were applicable to the then state of society and the condition and circumstances of the then Province of Upper Canada, and the Statute of Argument.

[*Present.—DRAPER, C.J., BURTON, PATTERSON, and MOSS, JJ.]

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George II. was not one of them. This Act, in its preamble, recites: "That gifts or alienations of lands, tenements, or hereditaments in mortmain are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility, nevertheless this public mischief has of late greatly increased by many large and important alienations or dispositions. * * * For remedy whereof be it enacted," &c. This shews that the Act was passed to provide for a state of circumstances then existing in Great Britain, and to prevent their occurrence there: thus shewing that the Act was local in its provisions and intention.

Argument.

At the time of the passing of the Provincial Statute it could not be said that any such mischief had arisen within this Province, or that there was then any reason for applying such a law in respect of lands which were of little value and probably seldom dedicated to charitable purposes. At that time there was no Court of Chancery in Upper Canada, neither was there any Registry Office for recording deeds, and therefore the provisions of 9 George II. could not be complied with. A "Deed, indented, sealed, and delivered," &c., was not alone sufficient, but enrolment in the "High Court of Chancery" was absolutely necessary to its validity. If the 9 George II. could not have been in force in Upper Canada by reason of there being no possibility of enrolling or registering the deed, then the same could not afterwards become law unless by special express enactment, even when a Registry law was subsequently passed.

Our first Registry Act (*a*), was passed some three years afterwards, and makes no express provision for registering instead of enrolment, and its provisions do not render an unregistered deed, &c., void, otherwise than as against subsequent purchasers, &c., whereas

(*a*) 35 George III. chapter 5.

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enrolment under 9 George II. is absolutely necessary to the validity of the deed, and under the present Registry law a deed of land to charitable uses, not registered, would not be void except as against a subsequent purchaser; therefore registration is not a compliance with the provisions of the 9 George II. chapter 36; besides, this Act makes certain exceptions in favour of certain Universities and Colleges in Great Britain, but makes no provision for similar institutions in any of the Colonies, shewing that the Act was not meant to extend beyond Great Britain.

In *The Attorney-General* v. *Stewart* (*a*), Sir *William Grant* held that this Act was local in its circumstances and operation, observing: "Framed as the Mortmain Act is, I think it quite inapplicable to Grenada or any other Colony. In its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for purposes of local policy complicated with local establishments, and incapable without great incongruity in the effect of being transferred, as it stands, into the code of any other country."

Argument.

In Doe *Anderson* v. *Todd* (*b*), the learned Chief Justice stated that he was formerly of opinion that 9 George II. ch. 36, was not in force in Upper Canada, and said, "Indeed several occasions have arisen in which this Court has determined, with respect to certain British Statutes passed before our provincial statute 32 George III. ch. 1, that they formed no part of the law of this Province, not having provisions in their nature applicable, and such as it could be supposed the Legislature intended to introduce under the general words used by them. These words, too, it must be remarked, are not such as expressly introduce the whole civil law of England; they seem rather intended to be more prudently limited to the purpose of giving the principles of English law, modified

(*a*) 2 Mer. at 160. (*b*) 2 U. C. R. 82.

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of course as they may have been by statutes, as the rule of decision for settling questions as they might arise relative to property and civil rights."

The decision in Doe *Anderson* v. *Todd* proceeded on the ground that the Provincial Legislature, by the provisions of the Church Temporalities Act, 3 & 4 Vic., ch. 78, had recognized the statute 9 Geo. 2, ch. 36, but this Act does not expressly refer to 9 Geo. 2, unless it comes under the definition of the term "Statutes of Mortmain."

Argument.

The Church Temporalities Act, in referring to the Statutes of Mortmain, does so rather by way of recital, and neither enacts nor assumes that the Mortmain Acts are in force, but is used by way of precaution, and was meant to imply, that should it ever be held that the Mortmain laws were in force in Canada, they should not interfere with the legislation in respect of the Church Temporalities Act. Moreover, sec. 8 of 14 Geo. III., ch. 83, states that it was only "the religious orders and communities" that were excepted from the general laws allowing all persons and bodies, &c., to hold lands; and that gifts and conveyances to charitable uses generally were not struck at or embraced within the meaning of the prohibition or exception in that clause, and the scope of that Act proves this more clearly, and nothing in the Provincial Act 32 Geo. III., ch. 1, is inconsistent with this view, or rather this latter Act merely substitutes other laws for carrying out the provisions, and attaining the objects in view in the former Act. This is also seen by reference to the British Act 31 Geo. III., ch. 31, and other Acts. This view may also explain why a reference in the Church Temporalities Act was made to the Statutes of Mortmain, for if they were ever to be held to be in force in Canada, it could only be in reference to "religious orders and communities."

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In *Whicker* v. *Hume* (*a*), the Lords Justices held that the Statute 9 Geo. 2, ch. 36, was not in force in New South Wales as being inapplicable to that colony, as the deed could not be enrolled, and there were special exceptions in favor of certain institutions. In the same case, (7 House of Lords Cases, 150, 160 and 166,) it was said that it would be necessary to shew that, under some (Provincial) Act, the Statute 9 Geo. 2 ch. 36 was transplanted to the Colony and was ingrafted upon the laws and institutions there; and *The Attorney-General* v. *Stewart* decides that the statute is not in force in any of the Colonies unless by special enactment.

Hallock v. *Wilson* (*b*), follows Doe *Anderson* v. *Todd*, and proceeds on the ground that registration is substituted for enrolment, and that the statute 9 Geo. II., ch. 36, is in force, because certain Provincial statutes have recognized it as being in force. *Mercer* v. *Hewston* (*c*), expresses a doubt whether the statute 9 Geo. II. is in force. That decision follows Doe *Anderson* v. *Todd* as being the law until otherwise determined by the Court of Appeal. *Anderson* v. *Dougall* (*d*), and *Anderson* v. *Kilborn* (*e*), do not discuss the question of whether the statute 9 George II. ch. 36, is in force or not; and *Davidson* v. *Boomer* (*f*), concedes that the statute is in force in this Province, following Doe *Anderson* v. *Todd;* but in *Hambly* v. *Fuller* (*g*), the judgment only states that it must be held that the statute is in force upon the above authorities until otherwise decided by the Court of Appeal.

Argument.

Ferguson v. *Gibson* (*h*), follows the above authorities, without discussing whether the Act is in force or not; and as all the decisions simply follow the first one of Doe

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(*a*) 16 Jur. 39.
(*b*) 7 U. C. C. P. 29.
(*c*) 9 U. C. C. P. 349.
(*d*) 13 Gr. 164.
(*e*) 13 Gr. 219.
(*f*) 15 Gr. 1 & 218.
(*g*) 22 U. C. C. P. 142.
(*h*) 22 Gr. 36.

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Anderson v. *Todd*, their force is weakened, and clearly there is no authority binding on this Court.

It is further contended that the Town of Whitby, being a duly incorporated town under Statute 18 Vic. ch. 28, and entitled to take and hold lands, is not subject to the Statute 9 George II. ch. 36.

The provisions of 36 Vic. ch. 48, particularly the latter part of sub-section 7 of sec. 372, which provides for aid and relief to charitable institutions, are inconsistent with the idea of the Mortmain laws being in force here.

The evidence shews that there was at the date of the death of the testatrix a Mechanics' Institute in the Town of Whitby, which was possessed of land suitable for a Mechanics' Institute and Free Library, and was not possessed of land of the annual value of $2000, and these bequests are good because they could be expended upon the said land; and the plaintiffs' contention is aided by reason of the Benevolent Society's Acts, Con. Stat. Canada ch. 71, and 34 Vic., ch. 32, O. It also appears that the testatrix devised no lands to the purpose in question, but only the proceeds of a mortgage which she held made by one *Greenwood*, and other personalty; and she in any event directed her lands to be regarded as personalty, and thus there was a conversion even if she had devised lands to the purpose in question.

Argument.

Counsel also contended that from the terms of this devise it is not one to a charitable use, inasmuch as it is confined to the inhabitants of the Town of Whitby, and does not embrace the public generally: *Cocks* v. *Manners* (*a*), and that in any event the Statutes of Mortmain do not apply to this case, because the application of the moneys bequeathed is in the discretion of

(*a*) 12 Eq. 585.

the trustees named in the will for the purpose: *Wilkinson* v. *Barber* (*a*).

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Mr. *Cassels* and Mr. *McMillan*, for the executrix, contended that the Imperial Statute of George II. was introduced into Upper Canada by 32 George III., ch. 1, the preamble of which states that it is "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign * * * and *to introduce the English Law as the rule of decision in all matters of controversy relative to property and civil rights.*" And the third section provides: "That from and after the passing of this Act in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same."

All that is necessary here to consider is, whether or not the Act of George II. affected property or civil rights in England at the time of the passing of 32 George III., which undoubtedly it did. If this be the case it makes no difference what the reasons or object for the passage of 9 George II. in England may have been, or whether the reasons adduced for enacting it in England were applicable to this country or not. The sole question is, was it a part of the law of England affecting property or civil rights.

Argument.

The Act may have been local in so far that it was local to England; but so were a great many other Acts introduced by 32 George III., and it was the law of England that was introduced so far as it related to property and civil rights.

It is not contended that the law, when passed in England, was intended to apply to the Colonies; but when it was passed it formed part of the law of England

(*a*) 14 Eq. 96.

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affecting property and civil rights; it was not local in that it was confined to a portion of England, and it could only be argued that it was not introduced, on the ground of its being a local law, if it were merely intended for one portion of England, and not to form a law for the kingdom at large.

The mischief which the Act was intended to meet in England may not have existed in Canada to the same extent, but this was so with many other Acts introduced at the same time. The Legislature, by the passage of 32 George III., were introducing laws not merely to meet evils then existing in Canada, but to provide against evils that might arise, and which but for that Act would have arisen.

Section 5 of 32 George III., by expressly excepting the laws relating to the maintenance of the poor, and respecting bankrupts, shews that the other laws were intended to be introduced. It might have been doubted whether the laws relating to the maintenance of the poor, &c., were not laws affecting property and civil rights, and the Legislature desired to prevent any such construction.

Argument.

If the Mortmain Acts were not introduced into Canada by 32 George III., still the subsequent recognition of them by the Legislature in the Church Temporalities' Act, referred to in Doe *Anderson* v. *Todd* (*a*), and in other Acts passed since then, and having since the decision in Doe *Anderson* v. *Todd* been recognized, they now form part of our law; and our Courts having recognized their existence in this country, to hold now that they are not in force would be to unsettle many titles to property.

The Attorney-General v. *Stewart* (*b*) was decided on a very different state of circumstances. The laws were

(*a*) 2 U. C. R. 82. (*b*) 2 Mer. 143

not introduced into Grenada by any Act similar to our Act of 32 George III., introducing the law relating to property and civil rights; and great stress is placed by the Master of the Rolls on the fact that certain other laws equally or more applicable than the Statutes of Mortmain were not considered by the Legislature of Grenada to be in force there, as, for instance, the Statute of Frauds; and at page 158 the Master of the Rolls points out that the Legislature may indirectly recognize the existence the laws in the country, and that applies expressly to Canada.

In *Whicker* v. *Hume* (*a*) it was only held that the statutes did not apply to New South Wales, and it may be observed that the Act, 9 George IV. ch. 83, under which it was contended they had been there introduced, differs materially from the 32 George III. It is there stated that only the laws in force in England "so far as they can be applied within the said Colonies" were introduced, and, at page 151, a great deal of stress is laid on the preamble to the Act, which is "An Act to make further provision for the Administration of Justice, &c.;" and at page 152 of the report it is clearly shewn that the statute applies to such Acts only as affected the Administration of Justice in New South Wales; the difference between these cases and the present is manifest. If in Canada we had been without the express enactment of 32 George III. then these cases would be more parallel and the arguments from them have weight.

Argument.

The Municipal Acts only exempt Corporations from the operation of the Statutes of Mortmain to a certain extent. Municipal Corporations are within the provisions of the Mortmain Act: *Shelford* on Mortmain, p. 17, Imperial Statutes 15 Richard II. ch. 5, *Brown* v. *McNab* (*b*).

(*a*) 4 Jur. N. S. 933. (*b*) 20 Grant 179.

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The devise in the will would necessitate the purchase of land in order to carry out the bequest: *Davidson* v. *Boomer* (*a*); *Re Watmough's* Trusts (*b*); *Hawkins* v *Allen* (*c*). They also contended that this was clearly a charitable bequest: *Attorney-General* v. *Heeles* (*d*), *British Museum* v. *White* (*e*); *Tudor's* Charitable Trusts, pages 9 and 13.

Mar. 24, 1876

DRAPER, C. J.—There is a well established distinction between colonies acquired by conquest, and those which have been accquired by settlement. Where an uninhabited country is *settled* by English subjects, all laws in force in England are in force there. But in a conquered colony the laws of England do not come into force until so declared to be by the conqueror, that is, the mere fact of conquest does not introduce the laws of the victor (*f*).

Judgment.

Other cases limit the general expression as to "*all* laws" in force in England being brought into force in a conquered colony. *Campbell* v. *Hall* (*g*), is a leading authority. In *Rex* v. *Vaughan* (*h*), Lord *Mansfield* sustains the distinction between a colony by conquest and a colony by settlement, and referring to the statutes 12 R. 2, c. 2, and 5 & 6 Edw. 6, c. 16, says: "If it (Jamaica), is considered as a colony, then these statutes are positive regulations of police not adapted to the circumstances of a new colony, and therefore, no part of that law of England, which every colony, from necessity, is supposed to carry with them at their first plantation."

The case of *The Attorney General* v. *Stewart* (*i*), raised the question whether the Statute of Mortmain (*j*),

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(*a*) 15 Grant, p. 7 and p. 218.
(*b*) L. R. 8 Eq. 272.
(*c*) L. R. 10 Eq. 246.
(*d*) 2 S. & S. 76.
(*e*) 2 S. & S. 594.
(*f*) Blankard v. Galdy, Salk. 411.
(*g*) Cowp. 204.
(*h*) 4 Burr. 2500.
(*i*) 2 Mer. 160.
(*j*) 9 Geo. ii. c. 36.

is only a law of local policy adapted to the country in which it is made, or a general regulation of property equally applicable to any country in which property is governed by the rules of English law. Sir *William Grant*, Master of the Rolls, adopted the first alternative. In a case affecting property in the island of Grenada, which was a conquered colony in which the French law prevailed at the time of the conquest, he observes: "The king might, undoubtedly, abrogate these (French laws), and substitute the laws of England in their place." Sir *W. Blackstone* commenting on the case of *Blankard* v. *Galdy* (*a*), says, as to the laws in force in settled colonies: "Such colonists carry with them only so much of the English law as is applicable to their own situation, and the condition of an infant colony, such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people; the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy; the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force."

Judgment.

From the report of the case of *Campbell* v. *Hall* (*b*), the following particulars as to the island of Grenada may be gathered:—

It was first established as a French colony in 1650, and was ceded to Great Britain by the treaty of 1763. In 1779 it was taken by the French, and was restored to Great Britain by the treaty of 1783. It is set forth in *Campbell* v. *Hall* (*c*), that His Majesty by letters patent had, in 1783, directed and empowered the Governor, with the consent of the council, and the representatives of

(*a*) 1 Comm. 108. (*b*) Cowp. 204. (*c*) Cowp. 204.

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the people, to make, constitute, and ordain laws for the public peace, welfare and good government of the colony, as near as might be agreeable to the laws of England. But it does not appear from the report how the law of England was first introduced into the island.

Upper Canada was at first a portion of the French Province of Quebec, and as such was ceded to the Crown of Great Britain. The French law was in force there, and the statute 14 Geo. III. ch. 83, sec. 8, enacted that His Majesty's subjects within that Province, (the religious orders and communities only excepted) might hold their properties and possessions, together with all customs and usages relative thereto, in as full a manner as if the proclamation of October, 1763, &c., &c., had not been made, and that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same. The Act further provided for the appointment of a council with power to make ordinances for the peace, welfare, and good government of the Province, with the consent of the Governor.

Judgment.

Then came the statute of 1791, the 2nd section of which is the first legislative notice of the existence of the Province of Upper Canada, the King having, as therein set forth, signified his intention to divide Quebec into two separate Provinces (*a*). Upper Canada was at that time principally inhabited by those British subjects who had adhered to their allegiance to the Crown during the American revolutionary war, and this Act constituted a Legislative Council and Assembly to make laws for the peace, welfare, and good government thereof. Section 33 provided that all laws, statutes, and ordinanees in force on the day on which the Act should come into force, should continue in force as if the Province of Quebec had not been divided, except as repealed or

(*a*) See Hansard's Parly. Hist., vol. 28, pp. 1271, 1375.

varied by that Act, or as might be repealed or altered under the authority of that Act. 1876.

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The criminal law of England was continued in the Province of Quebec by the 14 Geo. III ch. 83,

When, therefore, the 31st Geo. III. came into operative effect, Upper Canada had the criminal law of England in force, and the laws of Canada in regard to property and civil rights, and it had a Legislature in *embryo*, competent to change or abrogate these existing laws, and to make new ones. The first Legislative Act of the new Province was, to abrogate the laws of Canada, that is, the French laws, and any laws or edicts which were in force in regard to property and civil rights, within the Province of Quebec ; and they accompanied this abrogation with an enactment, that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England, as the rule of decision of the same.

Judgment.

It appears to me that these words are comprehensive enough to include the Act 9 Geo. II. ch. 36 ; nor can it, I think, be questioned that the Legislature of Upper Canada had power to pass an Act for the same object and intent as that English statute ; and there may have been reasons even at that early day for providing against the mischief which the English Statute was designed to prevent. * * Admitting that the object of the statute was political ; that object was to prevent a public mischief, which without it had shewn itself in England, and might equally arise here. The recital to the first statute passed by the Legislature of Upper Canada, contains among other things the following : "That part of the late Province of Quebec, now comprehended within the Province of Upper Canada, having become inhabited principally by British subjects born and educated in countries where the English laws were established, and

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who are unaccustomed to the laws of Canada," and is followed by a repeal of so much of the 14 Geo. III. ch. 83, as makes the laws of Canada the rule for decision. Considering the recital to the 4th section and the 5th section of that statute, and the 36th section of the 31 Geo. III., it might even at that early period of our provincial history be deemed wise and prudent to adopt a similar policy. The impossibility of administering equity in Upper Canada, for want of a proper tribunal, did not prevent that portion of English laws being introduced by 32 Geo. III. ch. 1. I do not see why the want of an office or Court in which an enrolment could be made, would create more insuperable difficulty to the introduction of the law which prohibited gifts for charitable purposes, unless made in a certain form.

Judgment.

The case of *Whicker* v. *Hume* (*a*), is not strictly applicable to this case. It goes no further than this, that the statute 9 Geo. II. ch. 36, does not by its own intrinsic force apply to the colonies of Great Britain: that the special provisions it contains, establish this conclusion. It must be conceded that it was not passed *eo intuitu*. But the question before us is, whether our Legislature have not made it part of our laws, and but for the case of *The Attorney General* v. *Stewart*, I should never have entertained a doubt on this point. I do not venture to express a dissent from the judgment of Sir *W. Grant*, when he says of the 9 Geo. II.: "It was passed to prevent what was deemed a public mischief, and not to regulate as between ancestor and heir the power of devising; or to prescribe as between grantor and grantee the form of alienation." In the latter part of his judgment in *Whicker* v. *Hume* Lord *Chelmsford*, C., after referring to the Imperial Statute 9 Geo. IV. ch. 83, adds: "That neither by Common Law nor by Act of Parliament is the Mortmain Act applicable to a devise of land in New South Wales."

(*a*) 4 Jur. N. S. 933.

These two cases, however they would prevent my offering any opinion at variance with what they decide, differ in one very important particular from the present case. In giving judgment in Doe *d. Anderson* v. *Todd* (*a*), Sir *J. Robinson*, C. J., points out the distinction, and I cannot do better than to quote his language. After stating that the reasoning of the Master of the Rolls in *The Attorney General* v. *Stewart* (*b*), as applied to the particular provisions of the 9 Geo. II., is obvious and irresistible, he adds "The Legislature, it is admitted, are the best interpreters of their own laws, and to say nothing of other evidences they have given of their understanding on this point, by the Church Temporalities Act, 3 & 4 Vict. ch. 78, they have provided that lands may be conveyed to such uses for the benefit of the United Church of England and Ireland in this province, as would clearly have been prohibited by the British Statute 9 Geo. II., and they have shewn it to be their understanding that without such express legislative authority, the English Statute of Mortmain would have restrained parties from making such a disposition, for they have added the words: 'The Acts of Parliament commonly called the Statutes of Mortmain, or other acts, laws, or usages to the contrary thereof, notwithstanding.'" The Act of Upper Canada, 9 Geo. IV. ch. 73, contains a similar provision as to the Statutes of Mortmain, and both these Acts were reserved for the Royal Assent, which was subsequently promulgated by proclamation. The same provision will be found in the Statute of Canada, 9 Geo. IV. ch. 15.

Judgment.

The case of Doe *d. Anderson* v. *Todd* was followed in *Davidson* v. *Boomer* (*c*), and in *Hambly* v. *Fuller* (*d*), and is recognized as a decision that the statute 9 Geo. II. ch. 36, is in force here. In Doe *Bowman* v. *Cameron* (*e*),

(*a*) 2 U. C. R. 82.
(*b*) 2 Mer. 160.
(*c*) 15 Grant 1.
(*d*) 22 C. P. U. C. 141.
(*e*) 4 U. C. R. 155.

1876. *Hallock* v. *Wilson* (*a*), and *Mercer* v. *Hewston* (*b*), are to the same effect.

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It should not, however, be forgotten that at the very time the Legislature of Upper Canada first met, there was in the western part of Upper Canada, along the shores of the Detroit river, a settlement principally of French Canadians, with one and probably several Roman Catholic churches and parishes; the clergy of which, up to a late period, and perhaps still, claim tithes from their resident co-religionists under the statute of 14 Geo. III. The introduction of the law of England in lieu of the law under which they had formerly lived, does not appear to have been unfavourably received by them.

The exceptions contained in the Upper Canada Statute, 32 Geo. III. ch. 1, in my opinion strengthen the presumption that it was not intended to exclude the Statute of Mortmain. The laws respecting the maintenance of the poor, and respecting bankrupts were expressly excepted. And subsequently, by the Act 2 Geo. IV. ch. 12, sec. 1, it was declared that the British Statute of 15 Geo. III., restraining the negotiation of promissory notes and inland bills of exchange, for less than a limited sum, and a similar statute passed in the seventeenth year of the same reign, should not extend to or be in force in the Province. The reason given, that the provisions of those Acts were "inapplicable to this Province," is virtually one of the reasons for Sir *W. Grant's* judgment in *The Attorney General* v. *Stewart* (*c*), but our Legislature evidently did not doubt that their first Act had introduced both these British Statutes into Upper Canada.

Judgment.

Then again, the Chancery Act, as was pointed out by Mr. *Cassels*, in his very able argument, provided for the establishment of the Court and its procedure, in the

(*a*) 7 U. C. C. P. 28. (*b*) 9 U. C. C. P. 349. (*c*) 2 Mer. 560.

year 1837, while the 11th section of that Act recites that the "*Law of England*" was at an early period introduced into this Province, and has continued to be the rule of decision in all matters of controversy relative to property and civil rights.

Then with regard to the celebration of matrimony, no provincial statute has professed to confer authority for that purpose on the clergy of the Church of England, though several Acts of the Local Legislature distinctly recognize its existence, and though it has been expressly given to the clergy, and ministers of various other Protestant denominations, the undoubted right of the clergy of the Church of England to exercise that function, must rest either on their orders, or on the adoption of the law of England, by the 32 Geo. III. ch. 1.

Upon the whole, I should have had great difficulty in holding that the case of *The Attorney General* v. *Stewart*, was a parallel case to the present. I am, however, relieved from this difficulty, by the reason on which the case of Doe *d. Anderson* v. *Todd* (*a*) was decided. I may say of that decision as was said by Vice Chancellor *Hall* in the case of *The British Mutual Investment Company* v. *Smart* (*b*), and in reference to a case of *Carter* v. *Saunders*, "It was decided by a very experienced, able, and careful Judge, * * * It is not merely that he has decided the case, but it has, as I consider, been the received law of real property up to the present time, and has never been denied or questioned, and I cannot but think and believe that there are titles depending on the soundness of that doctrine, which would be greatly disturbed if I were to take a different view of the law, and express a different opinion."

Judgment.

My conclusion is, that the statute 9 Geo. II., ch. 36, is in force in this Province; if a change is desirable, it must

(*a*) 2 U. C. R. 82.

(*b*) L. R. 10 Chy. 569 n.

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be sought from the Legislature. There have been no conflicting decisions in this Province, and if there had, so that there must be error on one side or the other, I should adopt the opinion and language of *Blackburn J.*, in *Jones* v. *The Mersey Docks and Harbour Board*, as reported in 11 Jur. N. S. 746 : 'Still the inconvenience caused by the unsettling the law, and disturbing what was quiet, is so great that we agree that even a Court of Error should be slow to reverse decisions, which, though originally wrong, have long been uniform. When such is the case, it may often be proper to persevere in the error, and leave the remedy to the Legislature.' "

It has, however, been argued that if the Statute of Mortmain be in force in Ontario, this case does not come within its operation.

Judgment.

It appears that *Margaret Watson* by her last will and testament, dated 2nd August, 1873, gave and bequeathed solely out of her personal estate to the Corporation of the town of Whitby, $4000, "for the purpose of establishing and maintaining in the said town of Whitby, a public Library and Mechanics' Institute, to be dedicated, and to belong to, and be under the control of the said Corporation, acting through the Mayor and Common Council thereof, or other governing body thereof, for the time being, who shall be the trustees of the said bequest, and shall carry out the same, and who shall be bound to keep the same open at all times to come, as a Public Library and Mechanics' Institute."

A great part of the testratix's personal estate was invested in a mortgage made by one *Greenwood* to her to secure the sum of $10,000, with interest, upon land in the township of Whitby. The testatrix died possessed of other lands, the proceeds of the sale of which would have satisfied the legacy in question, and proceedings have been instituted to foreclose the mortgage, and it is

stated in the answer to the amended bill, that in August, 1875, the defendant, *Isabella Liscombe*, caused the lands comprised in the *Greenwood* mortgage to be sold, and the purchase moneys are now available for the purpose of paying off the debts and legacies of the said estate.

The plaintiffs urge, that this was not a devise of land upon a charitable use, because the will expressly directed that the executors, so soon as might be after the death of the testatrix, should "convert all her real estate into money," with one exception not affecting the case; and this direction, it was contended, had the effect as between the charity, *i. e.*, the intended Public Library and Mechanics' Institute, and the defendant, the executrix, to make the money received by and through the instrumentality of the mortgage pure personalty in the hands of the executrix. *Steed* v. *Preece* (*a*), which was followed in *Arnold* v. *Dixon* (*b*), were relied upon to shew there had in this case been a conversion, but in neither of those cases was there any allusion to the Statute of Mortmain, while the case of *Campbell* v. *Radnor* (Earl of) (*c*), states Lord *Hardwicke's* opinion, that though a devise to a charity in Ireland was *per se* good, yet the money being upon mortgage on an estate in England, it could not be liable to a devise to a charity. And *Re Whatmough's* trustees (*d*), appears to me conclusively against the plaintiffs.

Judgment.

There are only two cases which I have seen which appear to uphold the plaintiffs' contention: *Shadbolt* v. *Thornton* (*e*), decided by Sir *L. Shadwell*, then Vice-Chancellor of England, and *Marsh* v. *The Attorney General* (*f*), decided by Sir *W. Page Wood*. In *Brook* v. *Badley* (*g*), Lord *Cairns*, L. C., observes upon these two decisions. After

(*a*) L. R. 18 Eq. 192.
(*b*) L. R. 19 Eq. 113.
(*c*) 1 Br. Ch. C. 271.
(*d*) L. R. 8 Eq. 272.
(*e*) 13 Jur. 597.
(*f*) 7 Jur. N. S. 184.
(*g*) L. R. 3 Chy. 782.

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stating the principle upon which he considers it is held, that if a testator devises his real estate to be sold, and the proceeds paid to *A. B.*, and *A. B.* subsequently devises those proceeds by name, or devises all his property to a charity, the proceeds of that real estate will not go to the charity, his Lordship denies that the reason which had been suggested for this consequence, namely, that *A. B.* or those who claim under him might insist upon taking it in its unconverted form, instead of having the estate sold, and thus the charity might become the possessor of the specific real estate, is the true reason ; but says, the reason is, that any one who has or acquires an interest in the money has an interest in the land.

Judgment.

In this case, the defendant, *Isabella Liscombe*, was sole executrix, with power to convert the real estate into money, and to pay out of the proceeds $4.000 for a charitable use. Part of the estate was a sum of $10,000, secured by mortgage upon land, and it seems the executrix has recently foreclosed the mortgage and sold the land. The will directed $4,000 to be paid to the plaintiffs' treasurer for the purpose of establishing and maintaining a Public Library and Mechanics' Institute. The plaintiffs can only claim this money as trustees for the charity. If the executrix had been directed to expend the money in the establishing and maintaining this Public Library, it is clear it would have been a void bequest. Can it make any difference that the plaintiffs are interposed as trustees to receive and apply it for the same purpose? The original intent was to establish a Public Library, &c. The proceeds of real estate or money secured by mortgage formed the only fund out of which the $4,000, directed by the testatrix to be so appropriated, could come. It has been, throughout the argument, admitted on both sides that the money must come out of that fund. It appears to me that this is a gift prohibited by

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the statute as being virtually a gift of a charge or incumbrance affecting real estate; the money therefore savours of the realty, and the gift is void. There is nothing in the case of *Lucas* v. *Jones* (*a*) to resist this conclusion.

Nor do I see that the powers of the Municipality, whether to acquire land or to grant it, affect this question, which is, whether the testatrix had power to give land of which she was mortgagee, or the proceeds of such mortgage, when converted after her death into money, to a charitable use.

I am of opinion the appeal should be dismissed with costs.

Judgment.

BURTON, J.—It is now over a quarter of a century since the Court of Queen's Bench, in the case of Doe *Anderson* v. *Todd* (*b*), held the Statutes of Mortmain to be in force in this Province. That case has been followed by numerous decisions both in the Courts of Common Law and in the Court of Chancery to a similar effect; but it was urged to us, that as these decisions were made in deference to the judgment of a Court of co-ordinate jurisdiction, and in some cases with an expression of doubt, if not of dissent, on the part of some of the learned Judges who took part in those decisions, they are not binding upon this Court.

Where solemn determinations, which establish a rule of property, have been acquiesced in for so long a period, a Court, even of last resort, should require very strong grounds for interfering with them; still less should it do so when it finds that such decisions have been acquiesced in and acted upon by the Legislature in subsequent enactments.

Large and valuable properties have been acquired, built upon, and improved, the titles to which depend upon this construction, so long acquiesced in, and recog-

(*a*) L. R. 4 Eq. 73. (*b*) 2 U. C. R. 82.

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nized by the Legislature ; and if, for any reasons, it is deemed desirable to effect a change, that should be left to the Legislature, which can impose such conditions and limitations as will prevent it operating unjustly upon parties who have acted in good faith upon these decisions.

We have in this Province an instance of this kind of legislation in the statute passed by the Legislature of Ontario in its first session of its first Parliament, placing a legislative interpretation upon the 27th Elizabeth, ch. 4.

So far back as 1813 the then Master of the Rolls, referring to the construction placed upon that statute—viz., that a voluntary settlement, however free from actual fraud, was deemed fraudulent and void, as against a purchaser for valuable consideration, even where the purchase was made with notice of such voluntary settlement—took occasion to remark that he had great difficulty to persuade himself that the words of the statute warranted, or that the purpose of it required such a construction, for it was not easy to conceive how a purchaser could be defrauded by a settlement of which he had notice before he made his purchase. But he added, it is essential to the security of property that the rule should be adhered to when settled, whatever doubt there might be as to the grounds on which it originally stood.

Judgment.

That, inequitable and unjust as it would appear to most minds, continued to be the law of this Province until the passage of the Act to which I have alluded. I am very far from saying that any reasons exist for any change in the law in reference to the Statutes of Mortmain, or for supposing that the decisions of the very able Judges who decided that those statutes were in force here were otherwise than correct ; but I concur in the view, that nothing but the most cogent reasons should induce us to interfere with them.

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Assuming, then, these Acts to be in force, is the bequest, under the circumstances, valid?

It was very ingeniously argued by the learned counsel for the appellants, that, inasmuch as the property of the testatrix, at the time of her death, available for the payment of this legacy, consisted of a mortgage which was personalty in her life-time, and as she had directed a conversion of all her real estate, this could never become realty. The case was similar in principle to those where one of several legatees, entitled to a portion of the proceeds of land, directed to be converted into personalty, himself makes a will, devising his share of the proceeds or all his property to charity.

The decisions, in such a case as the learned counsel suggested, seem to be somewhat conflicting. See *Entwistle* v. *Davis* (*a*), *Lucas* v. *Jones* (*b*), *Brook* v. *Badley* (*c*); but in the latter case Lord *Cairns*, after referring to the case of a testator devising his real estate to be sold, and the proceeds paid to *A. B.*, and *A. B.*, subsequently making his will, and devising all his property to charity, adds: "The proceeds of that real estate will not go to charity, and the bequest of the second testator to that extent is invalid. That is not matter in controversy at the present day;" but he denies the reason which has sometimes been suggested for this conclusion; viz., that the second testator, or those claiming under him, might, instead of having the land sold, insist upon taking it in its unconverted form, and thus the charity might become the actual possessor of specific real estate, and he puts the very case suggested by the learned counsel, of several such legatees, one of whom gives either his share of the proceeds or all his property to charity, and holds that the position of that second testator, with regard to the estate to be sold, is in substance

Judgment.

(*a*) L. R. 4 Eq. 272.
(*b*) L. R. 4 Eq. 73.
(*c*) L. R. 3 Ch., 672.

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that of a person who has a direct and distinct interest in land.

But it is unnecessary to consider those decisions, as this case comes, I think, clearly within the 3rd clause of the 9th Geo. II., ch. 36. That clause provides, "That all gifts and grants of any estate, or interest in land, *or of any charge or encumbrance on land* in trust for any charitable uses whatever," unless in the form prescribed by the Act, shall be void. It is not material that the legacy is given generally, or is directed to be paid out of the personal estate; the legacy here fails because in the ordinary legal administration of the assets, this charge must be applied to the payment of it.

It was not, I thought, seriously, and could not at all events be successfully contended that this was not a devise to a charitable use, and there is nothing in the Municipal Act, or in any of the clauses to which we were referred, authorizing the corporations thereby incorporated to take lands, or the proceeds of lands, or of a charge upon lands for charitable uses.

Judgment.

I think, therefore, that the decree of the Court of Chancery should be affirmed, and the appeal dismissed with costs.

PATTERSON, J.—Mrs. *Watson*, by her will, directs her executors to convert all her real estate, except a house and lot in Port Hope, into money, and out of the proceeds of her estate to pay three specific legacies. She then devises the Port Hope house and lot, and then makes the bequest which is now in question, bequeathing solely out of her personal estate to the Corporation of the Town of Whitby the sum of $4000, to be paid to the treasurer of the town, for the purpose of establishing and maintaining, in the said Town of Whitby, a public library and mechanics' institute, to be dedicated, and belong to, and be under the control of the said Corpora-

tion of the Town of Whitby, acting through the Mayor and Common Council thereof, or other governing body thereof for the time being, who shall be trustees of the said bequest, and shall carry out the same; and who shall be bound to keep the same open at all times as a public library and mechanics' institute, and for carrying on therein, and in and about the same the various exercises, duties, operations, works, rights and privileges of such an institution in the said Town of Whitby, and shall not sell or dispose of, or convert the same to any use or uses whatever, except to vary in such minor matters as in the judgment of the said Mayor and Council or other governing body, may best contribute to carry out the intentions of this bequest, and make it most useful and beneficial to the said Town of Whitby." Out of the residue of the estate the testatrix bequeaths ten other specific pecuniary legacies, and empowers the executors, if they think fit, to give $200 more to the trustees of the bequest hereinbefore made, to establish and maintain a public library and mechanics' institute, and leaves the residue to *Isabella Liscombe* and others, who are, or are represented by, the defendants.

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Judgment.

The estate applicable to the payment of the legacies consisted wholly, or nearly so, of money secured by a mortgage of freehold lands made by one *Greenwood* to the testatrix, and the defendants assert that, under the Statute of Mortmain, 9 Geo. II., ch. 36, the bequest to the plaintiffs is void.

The plaintiffs contend for the validity of the bequest on twelve grounds, which are set out in their reasons of appeal, and several of these grounds have been argued before us, viz.:—

1. That the Statute 9 Geo. II., ch. 36, is not in force in this Province.

2. That the Corporation of Whitby being entitled,

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under the Municipal Corporations' Acts, to take and hold lands, is not subject to the statute 9 Geo. II., ch. 36.

3. That the Corporation had lands on which there was space enough to erect a mechanics' institute and library, and there were buildings on those lands in which a mechanics' institute and free library could be held; wherefore it was unnecessary to bring further land into mortmain.

4. That the plaintiffs are entitled to form a mechanics' institute under the provisions of 14 & 15 Vic., ch. 86, and 19 Vic., ch. 53, and a mechanics' institute in Whitby would be by law entitled to hold real estate not exceeding in annual value $2000: and further, that mechanics' institutes are not subject to 9 Geo. II., ch. 36.

Judgment.

5. That there was at the death of the testatrix a mechanics' institute in Whitby, possessed of suitable land, and not possessed of land of the annual value of $2000.

6. That the plaintiffs' contention is aided by the Benevolent Societies' Acts, Consol. Stat. C., ch. 71, and 34 Vic., ch. 32, O.

7. That there is here no devise of lands, but only of the proceeds of the mortgage, and other personalty.

8. That the testatrix converted all her lands by directing that they should be regarded as personalty.

9. That the plaintiffs could not elect to take the land, because (1) no land was devised; and (2) the property was to be realized, and the proceeds given to a great number of legatees.

10. That the use in question is not a charitable use,

because it is confined to the inhabitants of the Town of Whitby, and does not embrace the public generally.

11. That the Statute of Mortmain does not apply, because the application of the moneys is in the discretion of the trustees.

12. That the bequest should be carried out under the doctrine of *cy-pres*.

The first ground is now raised for the first time before a Court of Appeal; but the decision of the Court of Queen's Bench, in Doe *Anderson* v. *Todd* (*a*), in which it was held that the Statute of Geo. II. had been adopted by our Statute 32 Geo. III. ch. 1, as one of the laws of England, to which resort was to be had in matters of controversy relative to property and civil rights, has been acquiesced in too long, and has for too long a period governed titles to land in this Province, to be now interfered with by any authority short of legislative enactment.

Judgment.

I do not assume to criticise the judgment of the eminent Judges by whom that case was decided, or to examine the question so fully as to form an independent opinion of how the matter should, when *res integra*, have been decided.

It is not necessary that I should do so, particularly as his Lordship, the Chief Justice, has fully discussed that question, and referred to the earlier statutes which bear upon it.

It may, however, not be improper to point out that, in my judgment, the decisions since Doe *Anderson* v. *Todd*, and the course of legislation—particularly recent legis-

(*a*) 2 U. C. R. 82.

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lation—have removed much, if not all of the difficulty that existed when that case was decided in holding that the Statute of Geo. II. was in force here.

It was contended that the statute was not applicable to the circumstances of this Province, and was therefore not in force here, chiefly because some of its provisions are local in their character; and the provision which lent most weight to the argument was that which required a deed to be enrolled in the High Court of Chancery, as it was forcibly urged that our Legislature could not be supposed to have intended to adopt an Act under which conveyances could only be operative by means of a proceeding for which no machinery existed in the Province. This argument was much relied on in the cases of *Attorney General* v. *Stewart* (*a*), and in *Whicker* v. *Hume* (*b*).

Judgment.

It is not my purpose to consider the answers by which this argument may be met when it is used, as it now is, with reference to a Province with an independent Legislature, or when advanced in relation to a statute which differs, as our statute does, in its structure from those under which the cases just cited were decided; though these answers have very considerable force, and were ably urged before us by Mr. *Cassels*. I think the ground for the argument itself has been got rid of by the combined effect of the decisions of our Courts, and the principles on which our legislation has proceeded.

Hallock v. *Wilson* (*c*), was an action of ejectment. The plaintiffs claimed under a conveyance made to them in trust for a society called the "Refugees' Home Society." In giving the judgment of the Court, *Hagarty*, J., after referring to several cases and statutes, says: "The language used in the statutes of Upper Canada

(*a*) 2 Mer. 143. (*b*) 4 Jur. N. S. 933 and 7 H. L. Cas. 150.
(*c*) 7 U. C. C. P. 28.

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as to substituting registration for enrolment, is broad enough to cover deeds of a class similar to that under discussion, although the immediate object of these enactments seems to have been to substitute registration for enrolment in relation to deeds of bargain and sale as such, without considering the objects for which the deeds were made. The fact that enrolment of deeds never has prevailed to any extent in this Province; the absence of the necessary machinery to carry it out; the uniform course of legislation on the subject, and the reason and object of enrolment itself, all convince us that the proper and correct decision to arrive at in relation to this subject is, that the Legislature, when they recognized the existence of the Statutes of Mortmain, and other similar statutes in this Province, intended that registration in the county registry office should be substituted for enrolment in the High Court of Chancery, where such enrolment is required by the English statutes."

Judgment.

In *Mercer* v. *Hewston* (*a*) the judgment of the Court was delivered by *Draper*, C. J., who rested his conclusion that the Statute of Geo. II. was in force here in the decision of the Queen's Bench in Doe *Anderson* v. *Todd*, and the recognition of that case by the Common Pleas in *Hallock* v. *Wilson*, while he did not quite concur in the opinion, expressed in the last-named case, that registration had been substituted for enrolment; but was rather inclined to hold that the enrolment in Chancery having been impossible in 32 Geo. III., it must be considered virtually dispensed with; and that a conveyance to charitable uses, if in other respects complying with the requisitions of 9 Geo. II., ch. 36, would be valid, and effectual.

In *Hambly* v. *Fuller* (*b*) it was held, following the previous decisions, that a conveyance of land to charitable uses, though within the Statute of Geo. II., was valid

(*a*) 9 U.C. C. P.3 49. (*b*) 22 C. P. 142.

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without enrolment. Several cases in Chancery were cited before us in which the decision in Doe *Anderson* v. *Todd* was always followed, and devises of land to charitable uses were held void.

I shall not attempt to trace the references to the Statutes of Mortmain, or the legislation bearing on the question, through the series of statutes, from the 32 year of Geo. III. to the present date. It is sufficient for my purpose to look at the legislation since confederation.

The eight volumes of our Ontario statutes contain many Acts of Incorporation, in each one of which the corporation created is empowered to take and hold lands. This provision, common to all statutes of this class, has not of itself any direct bearing on the present discussion, as it amounts only to a license in Mortmain, giving the corporate body with respect to the lands which it is permitted to hold, the same capacity as a natural person.

Judgment.

We find, however, among these Acts of Incorporation, a large number which incorporate societies for various religious and charitable purposes. To some of these societies express power is given to take lands by gift or devise made at least six months before the death of the donor or testator. Some of these Acts are public and general, as, e. g., 36 Vic., ch. 135, the Act respecting the property of religious institutions, section 20 of which enacts that : "Any religious society or congregation of Christians in Ontario may, by the name thereof, or in that of trustees, from time to time, take or hold, by gift, devise or bequest, any lands or tenements, or interests therein, if such gift, devise or bequest be made at least six months before the death of the person making the same." Limitations as to value are imposed, and the societies are required to sell the lands acquired by gift, bequest, or devise within seven years, and are

not allowed to invest the proceeds in mortgages of real estate.

Many of the Acts, containing similar provisions, are of the nature of private Acts; as, e. g., 31 Vic., ch. 59, incorporating the Toronto Young Men's Christian Association; ch. 60, incorporating the Sisters of L'Hotel Dieu, at Kingston; ch. 61, incorporating St. Andrew's Church, at Ottawa; 34 Vic., ch. 92, incorporating the Sisters of St. Joseph, at London; 36 Vic., chs. 145 and 146, incorporating Missionary Associations of the Baptist and Congregational Churches; 37 Vic., ch. 91, incorporating the Cathedral of the Holy Trinity, at London; and 38 Vic., ch. 75, respecting the union of certain Presbyterian Churches.

The purpose of this legislation is to enable the charitable institutions to do, within the prescribed limits, that which, but for the express power given, it was evidently assumed they could not have done. It would have been unnecessary to give express power to take by devise or by gift, made only six months before the donor's death, unless there was already some restriction upon taking in that manner. It seems to me unquestionable that this legislation is framed in clear recognition of the law as decided by the Courts, that the Statutes of Mortmain are in force; that a license to hold in Mortmain, or power to a corporation to hold lands, would, by itself, be ineffectual to enable the corporation to take lands for a charitable use by devise or by deed made less than twelve months before the grantor's death; and that, alike in the case of a corporation and in the case of unincorporated trustees, such express legislative authority is requisite.

Judgment.

The second, third, fourth, fifth, and seventh grounds of appeal do not require that we should express any opinion as to the matters of law suggested by them, be-

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cause those matters do not really reach the essential merits of the question before us.

It cannot now be disputed that a bequest to a charitable use which can only be satisfied by moneys secured by mortgage, is forbidden by the terms of the statute. The law is expressly so stated in many authorities, and nowhere more clearly than in the judgments of Lord *Campbell*, Lord *Cranworth*, and Lord *Kingsdown*, in *Jeffries* v. *Alexander* (*a*), and by Lord *Romilly*, in *Nethersole* v. *School for Indigent Blind* (*b*). Nor can it be contended that either the Corporation of Whitby or the Mechanics' Institute already existing there, although seized of lands, and empowered for certain purposes to take and hold lands, can take land *by devise or bequest* for a charitable use. That power is by no means involved in the authority to take and hold lands. This is expressly decided in the cases cited to us of *Mogg* v. *Hodges* (*c*), *Trustees of British Museum* v. *White* (*d*), and other cases, including *Nethersale* v. *School for Indigent Blind.*

Judgment.

The sixth ground of appeal claims assistance from the statute respecting certain philanthropic societies, C. S. Can., ch. 71, amended by 34 Vic., ch. 32, O. That statute has no relation to the subject before us; but it assists the argument, though it does not aid the appellant, by the comparison of section 7, which allows the societies there dealt with to take lands by devise, with section 4 of the next statute, ch. 72, which withholds that power from library associations and mechanics' institutes.

The eighth ground of appeal is founded on the assumption that the testatrix had converted all her lands from realty into personalty.

(*a*) 8 H. L. Cas., at pp. 647, 654 & 677.
(*b*) L. R. 11 Eq. 1.
(*c*) 2 Ves. Sr. 52.
(*d*) 2 Sim. & St. 594.

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The point made is in effect, that something which the testatrix said or meant to say controlled the statute of Geo. II., and made an interest in land devisable to a charity.

The assumption of fact is not borne out by the will, one part of which directs $3000 to be laid out in purchasing land, and to that extent converts personalty into realty. But this equitable doctrine of conversion affects only the representatives of the testatrix as among themselves, and neither changes the *legal* character of the property, nor interferes with the operation of the statute (*a*).

The ninth ground can only be sustained by establishing the two propositions which it advances, viz., that the statute only affects the bequest in question because the legatees may elect to take the land instead of the money; and that such an election is impossible when the charitable legacy is only one of several which are charged on the same fund and the same security.

Judgment.

Neither of these propositions can be maintained. The bequest is void, because it is within the very terms of the statute, as shewn by the case of *Jeffries* v. *Alexander* (*b*), and others already referred to, and by the judgment of Lord *Cairns* in *Brook* v. *Badley* (*c*). The circumstance of this legacy being only one of several, does not prevent the application of the law. In the case last cited Lord *Cairns* says: "It may very well be that no one of those four persons could insist upon entering on the land, or taking the land, or enjoying the land *qua* land; and it may very well be that the only method for each one of them to make his enjoyment of the land productive, is by coming to the Court, and applying to have the sale carried into execution; but nevertheless the interest of each one of them is, in my opinion, an interest in

(*a*) Williams on Exors., 6th ed., 622 et seq. (*b*) 8 H. L. 549.
(*c*) L. R. 3 Chy. 672.

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land; and it would be right to say in equity that the land does not belong to the trustees, but to the four persons between whom the proceeds are to be divided." The legacies which were held void in *Page* v. *Leapingwell* (*a*) were two legacies of £100 each, which the will directed to be paid out of a sum of £10,000, to be produced by the sale of a mansion house.

Judgment.

It was stated, and was argued as the tenth ground of appeal, that by reason of the charity being confined to the inhabitants of Whitby, and not embracing the public generally, it does not come within the statute; and the case of *Cocks* v. *Manners* (*b*) was cited in support of that contention. It was held in that case by Sir *John Wickens*, V. C., that a voluntary association of women, for the purpose of working out their own salvation by religious exercises and self-denial, but having no purpose tending directly or indirectly towards the instruction or edification of the public, was not a charitable institution within the description contained in the preamble of 43 Eliz. ch. 4. This is very far from supporting the appellants' proposition. "Devises and bequests, having for their object the establishment of learning, are considered charitable use swithin the statute 43 Eliz. ch. 4." *Shelford* on Mortmain, p. 58: "I consider every gift for a public purpose, whether local or general is within 9 Geo. II., although not a charitable use within the common and narrow sense of those words." See Sir *John Leach*, V. C., of England, in *Trustees of British Museum* v. *White* (*c*).

The eleventh and twelfth grounds of appeal were not insisted on, and could not have been, even plausibly urged. The eleventh wanted a foundation of fact, and no circumstance existed to warrant the application of the rule invoked by the twelfth.

(*a*) 18 Ves. 463. (*b*) L. R. 12 Eq. 374. (*c*) 2 S. & S. 495.

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I have noticed the several grounds of appeal, because some of the questions indicated by them are important in themselves, and I have thought it right to note, however briefly, my view of them in relation to the present appeal; but for the disposition of the case it would have been sufficient to say that I entirely agree with the learned Vice Chancellor in the judgment delivered by him.

I am of opinion that the appeal should be dismissed with costs.

Judgment.

Moss, J.—The question of principal interest in this case is whether the Stat. 9 Geo. II. ch. 36, commonly called the Mortmain Act, is in force in this Province. More than 30 years ago the Court of Queen's Bench upon full consideration held that it was in force. Since that time, in express deference to that authority, the Courts of Common Law, and the Court of Chancery have decided many cases, and many devises and bequests to charitable uses, otherwise unimpeachable, have been adjudged invalid. The point is now for the first time raised in a Court of Appeal. So many estates have been administered and so many titles have been acquired upon the assumption of the correctness of a decision which had been followed so often by Courts of co-ordinate jurisdiction, and remained so long unchallenged on appeal, that its reversal would be attended with serious consequences. Under such circumstances it would deserve consideration whether the case was not a fitting one for the application of the rule—*stare decisis*. It might be thought that the language of Lord *Westbury* in *Ralston* v. *Hamilton* (*a*) was not inapplicable, although used in a very different kind of case: "The rules which govern the transmission of property are the creatures of positive law, and when once established and recognized, their justice or injustice is of less importance to the community than that the rules themselves shall be constant and invariable."

(*a*) 4 Macq. 397.

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If the only question was, whether Doe *Anderson* v. *Todd* (*a*) was well decided, I should hesitate long before holding in the affirmative. The points then presented for determination were, whether the Provincial Statute, 32 Geo. III. ch. 1., should have been judicially interpreted to have the effect of introducing the Stat. 9, Geo. II. ch. 36, and if not, whether subsequent legislation had effected a change in the law. *Robinson*, C. J., was of opinion that but for subsequent legislative exposition the true interpretation of the Stat. of Geo. III. excluded the Mortmain Act, while the other members of the Court seem to have entertained a different view. The reasoning of the Chief Justice appears to me to be unanswerable—at least if the decision of Sir *William Grant* in *Attorney-General* v. *Stewart* (*b*) is correct, and apart from its intrinsic force it would be hopeless to impugn this after its approval by the House of Lords in *Whicker* v. *Hume* (*c*). It was attempted in the argument of this appeal to distinguish Doe *Anderson* v. *Todd*, and withdraw it from the application of the principles enunciated in the two English cases. I do not think that the attempt was attended with success. It proceeded upon differences in the terms employed in introducing the laws of England into this Province and into Grenada and New South Wales respectively. Our statute enacted that "In all matters of controversy relative to property and civil rights resort should be had to the laws of England as the rule for the decision of the same." In Grenada justice was to be administered as near "as might be" according to the laws of England. In New South Wales the laws in force in England "so far as they can be applied within the said colonies" were introduced. Sir *William Grant* held that the question of whether the Statute was in force in Grenada depended "upon this consideration—whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally

Judgment.

(*a*) 2 U. C. R. 82. (*b*) 2 Mer. 143. (*c*) 17 H. L. 150.

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applicable to any country in which it is by the rules of English law that property is governed;" and having discussed the scope of the Statute he decided it to be local in its character, and not a general regulation of property. In *Whicker* v. *Hume*, Lord *Cranworth* emphatically says: "With regard to this Statute of Mortmain, ordinarily so-called, I cannot have the least doubt that that cannot be regarded as applicable to the colonies."

This being the construction placed upon the statute by such high authority, the respondents were forced to the broad construction that *all* the laws of England, relating to property and civil rights, whatever might be their historical origin, or however political their character, or however clearly they grew out of local circumstances or were meant to have a local operation, were introduced. The observations of the Chief Justice in Doe *Anderson* v. *Todd* seem to me effectually to dispose of this proposition. As he points out, the language of the Statute does not expressly introduce the whole civil law of England, but seems to be limited to the purpose of giving the principles of the English law as the rule of decision for settling questions as they might arise relative to property and civil rights. If this be the correct view, I cannot perceive that any substantial distinction can be founded upon the differences of language to which I have referred. The Court of Queen's Bench, however, was unanimously of opinion that by the Church Temporalities Act (3 & 4 Vic. ch. 78) the Legislature had interpreted the Statute of 32 Geo. 3, ch. 1, as introducing the Statute of Mortmain. That Act provided for the conveyance of lands to certain uses for the benefit of the United Church of England and Ireland in this Province, and added this proviso: "The Acts of Parliament commonly called the Statutes of Mortmain, or other acts, laws or usages to the contrary thereof notwithstanding." The Court was of opinion that this provision was equivalent to a declaration by the Legislature that the Act in

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question was in force, and that the construction to be placed on the Statute of 32 Geo. III. was thereby determined. I am not convinced that this is a sound conclusion; but in the view that I take of this case it is unnecessary to examine it closely. I only refer to it, because I do not desire, if a similar case should arise, to be thought to have accepted that as a sound rule of interpretation, when I came to the opinion that we should now hold the statute to be in force. The question seems to me to present a very different aspect now. Then the only legislative exposition was that offered by the proviso already quoted, and I believe a similar provision in another Act. But since that decision the Legislature has, as my brother *Patterson* has pointed out, very frequently passed enactments which involve the assumption that the Statute was in force. Now the Legislature must be assumed to have been aware of the decision in Doe *d. Anderson* v. *Todd.* They knew that there had been a solemn adjudication that the Statute of 9 Geo. II. ch. 36 was a part of our laws. Instead of enacting anything to the contrary, they impliedly recognized that adjudication by enactments which would otherwise have been unnecessary, if not unmeaning. It is upon the ground of this subsequent legislative recognition that I wish to place my judgment that the statute must now be held to be in force in this Province.

Judgment.

The other ground of appeal upon which stress was laid in argument is, that even if the statute be in force the gift to the appellants does not come within its scope. That gift is of the sum of $4,000 out of the personal estate of the testatrix for a charitable purpose. The only source from which this sum can be derived is a mortgage upon realty held by her for a much larger sum. The contention is, that the statute does not prevent this payment, because a gift is only void when its effect is to entitle the donee to take an interest in land by election, and that the appellants

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could not elect to take this mortgage or any interest in the land, inasmuch as other legacies were also to be paid out of its proceeds. That question seems to be quite determined by authority. The expressions of Sir *W. Page Wood*, in *Lucas* v. *Jones* (*a*), upon which much reliance was placed by the learned counsel for the appellants, do not, even if they contain a correct exposition of the law, go the length of the appellants' contention. The case with which the learned Vice-Chancellor was dealing arose upon the will of *Mary Margery Prosser*, by which several charitable legacies were given. One *Anne Prosser* had previously made a will devising a share in her estate to *Mary Margery Prosser*, and shares to other persons. The latter shares had all become beneficially vested in *Mary Margery* before her death, and she was then the sole surviving executrix of *Anne Prosser*. The question then was, whether the charitable legacies given by the will of *Mary Margery* were to be satisfied out of an incumbrance upon land which had belonged to *Anne Prosser*, and been devised by her will. In favour of the charities it was argued that there was a conversion of this incumbrance into pure personalty, because if the executors of *Anne Prosser* had discharged their duty and realized, it would have been turned into cash, and been so much money belonging to *Mary Margery* at the time of her death. The Vice-Chancellor did not accede to that argument but held that the charities were not entitled. In delivering judgment, however, he made the following statement : "The result of holding that mortgages could be given to charities under the statute would be, that charities would be enabled to foreclose the mortgage or realize the security, which would be the same thing as allowing them to have a charge upon the land, and would clearly be an evasion of the Mortmain Act. And again, "The principle seems to be this, that if any

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(*a*) L. R. 3 Eq. 76.

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person by whose will gifts in favour of charities are made has the sole control of property which is obnoxious to the Mortmain Act, then the property must be taken in the shape in which it is found; but if, on the other hand, the property is directed to be sold, and the proceeds divided between several persons, inasmuch as the second testator has not the whole control over the property, and is not entitled to deal with it *in specie*, it must be regarded as converted, and in the form of money."

Now, even assuming this to be a correct exposition of the rule, it does not appear to be applicable to the present case. It may indeed be thought, and it was argued, that the learned Vice Chancellor entertained the view that the sole reason for holding invalid a gift of a mortgage interest to a charity was the power it would thus possess of acquiring land by foreclosure. If that is the proper interpretation of the passage, it no doubt lends some assistance to the appellants' argument, for it would be scarcely reasonable to hold that there is any danger of the appellants acquiring the land here in mortgage But I am not sure that the learned Judge meant this interpretation to be placed upon his remarks; and if he did, I think they are opposed to authorities of the greatest weight. In truth these remarks were little, if at all, more than *obiter dicta*, the real question being, not whether *Anne Prosser* could have bequeathed this mortgage or any interest in it to a charity, but whether *Mary Margery*, who was only interested in the mortgage under *Anne's* will, could so bequeath. In *Brook* v. *Badley* (*a*) Lord *Cairns* expressly lays it down that the above is not the true reason.

Judgment.

But upon this point the judgment of *Blake*, V. C., in this case really leaves nothing to be added. I entirely agree with him that *Jeffries* v. *Alexander* (*b*) is conclusive. I cannot discover any reason for supposing that any of

(*a*) L. R. 3 Ch. 674. (*b*) 8 H. L. 549.

the dissentient Judges, who thought the gift in that case valid, would have upheld the gift now in question, so far as it is necessary to resort to the mortgage.

I agree that the appeal must be dismissed with costs.

KNOX v. TRAVERS.

Demurrer—Administration of Justice Act—Fraudulent judgment.

Where, by fraud and collusion a judgment has been recovered at law to protect the property of the judgment debtor, and a creditor takes proceedings at law for the recovery of his demand, he is precluded from applying to this Court for relief, as the Court of law has power to work out all the rights and remedies necessary to do complete justice.

The plaintiff filed his bill on behalf of himself and all other creditors of the defendant *Edwin Weeks Travers*, alleging that by collusion between him and his co-defendant a judgment had been fraudulently recovered against *Edwin Weeks Travers* in favour of the defendant, *Jonathan Travers*, and executions issued thereon with the object and intent of fraudulently protecting the goods and lands of *Edwin Weeks Travers* from his creditors, and alleging fraud under 13 Elizabeth, cap. 5; and further, that in October, 1875, the plaintiff and other creditors had commenced proceedings at law, and prayed that the defendant, the fraudulent judgment creditor, might be restrained from enforcing his executions. The defendants demurred for want of equity. Statement.

Mr. *Fitzgerald*, Q. C., for the demurrer, contended that the provisions of the Administration of Justice Act precluded any necessity or right on the part of the plaintiff to institute these proceedings, as all the relief that this Court could possibly afford in the premises might with equal certainty have been obtained in the Court of common law, where the alleged fraudulent proceedings are stated to have been taken.

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Mr. *Hodgins*, Q, C., contra.

BLAKE, V. C.—The bill which is filed on behalf of the plaintiff and all the other creditors of the defendant *Edwin Weeks Travers*, alleges that the plaintiff is a simple con tract creditor of the defendant to the extent of $242, and that the defendant owes over $1,000 to the other creditors : that after this debt was incurred the defendant *Edwin Weeks Travers* colluded with his father, the co-defendant *Jonathan Travers*, and on the 26th of December, 1872, the father commenced an action against the son, on a pretended claim, and on the 16th of January following recovered a fraudulent and collusive judgment against him for $364.42, on which executions against goods and lands were issued to the county of Hastings, where the defendant then had goods and lands on which the judgment and execution form a lien ; that the plaintiff and all other creditors of *Edwin Weeks Travers* have commenced actions at law for the purpose of recovering their respective claims, which actions are still pending. The bill asks that the judgment may be declared fraudulent, and that the father may be restrained from enforcing it. The plaintiff and the other creditors of the fraudulent debtor have commenced proceedings at law. This being so they are bound, in the Court in which the recovery of their claims has been in the first instance sought, there to seek for complete relief. Where there was a fraudulent judgment prior to the passing of the Administration of Justice Act, this Court was in the habit of interfering in favour of a subsequent creditor, whose judgment was thereby impeded : see *McDonald* v. *Boice* (*a*), *Stevenson* v. *Nichols* (*b*), *Paton* v. *Ontario Bank* (*c*), *Commercial Bank* v. *Wilson* (*d*). Since this Act has come into force it is not necessary to exercise that jurisdiction, as the Court

Judgment.

(*a*) 12 Gr. 366. (*b*) 14 Gr. 473, and 3 E. & A. 367
(*c*) 12 Gr. 48. (*d*) 13 Gr. 489.

of law has complete power to work out all the rights and remedies necessary to do complete justice in respect of any claim made. The plaintiff, if he pleased, might have begun his proceedings in this Court, when a decree could have been made for the amount claimed, and the question of the validity or invalidity of the impeached judgment could have been inquired into. This he did not choose to do, and as the bill does not shew that there is any danger that, in the meantime, the property can or will be sold or interfered with, nor does it make out any special case for interference, I do not think I can give the plaintiff any relief. To do so would be virtually to overrule the numerous cases in the Court, in which that which has been considered to be the effect of the Administration of Justice Act has been carried out, and in which the party has been compelled to seek complete relief wherever he has chosen to institute his proceedings. I think the demurrer should be allowed with costs.

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Judgment.

Sawyer v. Linton.

Demurrer—Fraudulent conveyance—Certainty of allegation.

In a suit impeaching a conveyance on the ground of fraud, the bill stated that the grantor for a "professed" valuable consideration conveyed the land; and that the conveyance "was made with intent on the part of the said defendant to defeat, delay and defraud the said plaintiff," and the other creditors.

Held, that this sufficiently stated a want of consideration for the conveyance, and that the object was to defeat, hinder and delay creditors within the meaning of the Statute, 13 Eliz., ch. 5.

Where a bill was filed by an execution creditor to impeach a conveyance by the debtor, and it did not appear that the action at law had been commenced after the passing of the Administration of Justice Act, a demurrer on the ground that the plaintiff ought to have obtained relief in the suit at law was overruled.

Statement.

The plaintiffs, who sued as well on behalf, &c., by their bill charged that the defendant *William Linton*,

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being owner in fee of land in Haldimand, did on the 2nd of January, 1872, for a "professed" valuable consideration, convey the same to the defendant *John Linton* (his son), who still owned the same: that in January, 1873, the said defendant *William Linton*, and the defendant *Thomas Linton*, became indebted to the plaintiffs in the sum of $450, for the purchase of a threshing machine, and for which they gave the plaintiffs their promissory notes according to the terms of the contract between the parties:—that on the 24th of January, 1876, the plaintiff recovered judgment on certain of the said promissory notes, and executions were issued thereon against goods and lands, which remained in the hands of the sheriff unsatisfied, the sheriff being unable to find any property out of which he could make the amount of the writs. The bill further charged that the said conveyance "was made with intent on the part of the said defendant to defeat, delay, and defraud the said plaintiffs and the other said creditors," and prayed relief accordingly. The defendants demurred for want of equity.

Argument.

Mr. *Moss*, for the demurrer, submitted, that the allegation of want of consideration was not sufficient, the words of the statute being a pretended consideration: that the bill itself alleged that the grantee *John Linton* still owned the land, which could not be the case if the conveyance were fraudulent: that it required to be stated that the conveyance was made to defraud, hinder, and delay the creditors; and that the whole relief now sought could have been obtained in the action at common law, under the ruling in *Knox* v. *Travers* (*a*), the bill shewing that judgment had not been recovered until January, 1876.

Mr. *McQuesten*, contra, was not called on.

(*a*) Ante page 41.

BLAKE, V. C., overruled the demurrer, considering the statements of the bill sufficient to satisfy the requirements of the Statute of Frauds, both as to the want of consideration and the fraudulent intentions of the parties to the deed; that the bill correctly asserted the title to be in *John Linton*, for as between the parties to a fraudulent conveyance the title did vest in the grantee; and as to relief having been obtainable in the action at law, it was impossible to say from the allegations in the bill that the action there had not been commenced before the passing of the Administration of Justice Act, although judgment was not recovered until long after that date.

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RE HENDERSON'S TRUSTS.

Trustee and cestuis que trust—Investing trust funds in real estate—Building.

Trustees being empowered to invest the moneys of the trust in the purchase of real estate, may in their discretion do so in the erection of a new building, when an increased income can be obtained thereby. It is, however, for the trustees to determine for themselves whether the circumstances are such as to justify such expenditure, and that the amount is proper.

This was a motion on petition for an order authorizing the trustees of a marriage settlement to expend a sum of money in the erection of a building on a portion of the trust estate.

Statement.

The petition stated that by the will of the late *John Ewart* he devised a certain share or interest in the lands owned by him to certain trustees in trust for *Catherine Seaton Ewart* for life, with remainder to her three children *Jane Emily*, *Annie Louise*, and *John Skirving*, as she should appoint. That after-

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wards, and by virtue of a power in the will, the real estate of the testator was partitioned among the several devisees, and *Catherine S. Ewart* having executed a deed of appointment in favor of her three children in equal shares, the surviving trustee under the will executed a conveyance of the real estate vesting a life estate in *Catherine S. Ewart* with remainder, in fee to her three children.

That a marriage being in contemplation between *Joseph Henderson* and the said *Annie Louise*, a settlement was executed whereby she granted to *William Davison* and *John Skirving Ewart* all her estate and interest in remainder in all the said lands, upon certain trusts in favor of the said *Joseph Henderson* and herself, and any issue which there might be of the marriage.

Statement.

That the marriage was duly solemnized.

That the settlement contained a power to the trustees to sell the lands or any part thereof, and to invest the proceeds in certain ways, and amongst others in the purchase of real estate.

That a portion of the real estate had lately been sold for $14,500, which had been invested in mortgages, and another portion consisted of a lot in the business part of the city of Toronto, valuable as a site for offices or a warehouse, on which was erected,—covering about half its area—a two story brick house, very old and dilapidated and out of repair, and which would require a large sum of money to put in a state to attract tenants. Only a few rooms in it were rented, and the whole income derived from it was $216 annually, out of which taxes and insurance to the amount of about $125 had to be paid.

That it would be greatly to the advantage of all parties concerned to pull down this building and put up a new one at a cost of from $8,000 to $10,000,—and the petitioners and the other parties interested in the land were anxious that this should be done ; and it was proposed to raise sufficient money to erect the building either by sale of the mortgages above mentioned, or by mortgage of the same or other lands owned by the parties ; but it being considered doubtful whether the trustees of the marriage settlement had power to spend money in the erection of the new building, the present application was made.

Mr. *Ewart* in support of the petition.

PROUDFOOT, V. C.—[After stating the facts as above]. —This petition is presented by Mr. and Mrs. *Henderson* and the trustees, under the 29 Vic., ch. 28, sec. 31, (the same as Lord St. *Leonard's* Act, 22 and 23 Vic., ch. 35, sec. 30), and prays that it may be declared whether under the trusts of the marriage settlement the trustees have power to spend or borrow money for the erection of a building upon a portion of the trust estate, and that they may be authorized so to spend or borrow. Judgment.

An affidavit has been filed by one of the trustees verifying the petition, and the settlement has been produced.

As under this statute it has been held that the statements of the petition are alone to be looked at, and that no evidence can be received, I cannot say that it would be proper to spend $8,000 or $10,000 or any sum in building, as that would be going into detail with which the Court cannot properly deal without evidence. *Re Barrington's* settlement *(a)*.

(*a*) 1 J. & H. 142.

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But, as was done in that case, I have no objection to express my opinion as to the principle involved. I think that a power to invest in realty authorizes an investment in erecting a building,—a permanent and substantial improvement on the realty. The Lands Clauses Act, (1845, S. 69), gave the Court power to invest money belonging to persons under disability in the purchase of other lands to be settled to the same uses as those taken; and *In re Leigh's* estate (*a*) this was held to justify an expenditure in building, "For if the Court has power to order the money to be applied in buying a piece of land with a building upon it, there was no reason why a new building should not be built upon the old land, if an increase of income is obtained thereby." And under the Settled Estates Act (*b*) a similar power of investment was given, and a similar conclusion arrived at. "The cases proceed on the principle that the erection of a building is substantially the same thing as the purchase of a new estate." A number of cases are cited in that case which establish the same thing, and which are too strong to be departed from.

Judgment.

I think the same construction is applicable to a power exercisable by trustees, as to one exercisable by the Court.

The trustees will have to determine for themselves whether the circumstances are such as to justify the expenditure in that way,—and of the amount being proper,—and obtain the consent of those interested.

(*a*) L. R. 6 Chy. 887. (*b*) 19 & 20 Vic., C. 120, S. 23.

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TULLY v. FARRELL.

Temporalities Act—Election of Churchwardens—Votes of women—Mandamus—Qualification of voters—Costs.

This Court has jurisdiction to entertain a bill for the purpose of setting aside the improper election of a churchwarden, and for that purpose to order a scrutiny of votes. A party so complaining is not compelled to resort to proceeding by mandamus, the remedy in this Court being speedy, and there being nothing in the machinery or practice to prevent the decision being equally accurate.

The absolute purchase of a pew in a church creates in the purchaser a fee simple, which is not subject to forfeiture by reason of a change of residence of the purchaser, or his ceasing to frequent such pew; and he may bargain, sell, or assign his interest to another, being a member of the Church of England; or the pew may be apportioned into sittings amongst several grantees or assignees, either for value or without consideration, each of whom will have a voice in the election of churchwarden; so also the owner of a pew may devise the same, and in the event of intestacy his interest therein will, like his other freeholds, descend to his heir at law.

Under the Church Temporalities Act (3 Vic., ch. 74, sec. 2), all persons of either sex holding pews, whether as owners or lessees thereof, or holding sittings therein under certificates or other memoranda from the churchwardens, are entitled to vote at vestry meetings held for the election of churchwardens.

Where a person claims to be entitled to vote as holder of a sitting in a pew, the voter must, if required so to do, produce a certificate shewing that the voter holds by leave of the churchwardens; but no particular form of certificate is necessary; a receipt for the rent of such sitting is sufficient. This, however, is not necessary in the case of a lease of a pew; there a verbal lease suffices.

In a proceeding to set aside the election of a churchwarden, *held*, that it was too late, at the hearing, for the defendant to object that the bill should have been on behalf of the plaintiff and such of the members of the vestry as voted for him only; not on behalf of all the members thereof.

On the 29th of March, the day of the election of a churchwarden, application was made to rent a pew for three months from the 1st of April following, and the application was granted.

Held, that this did not confer a right on the applicant to vote at such election.

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Where the absolute owners of pews authorize the churchwardens to lease the same or rent sittings therein, the lessees or occupiers are entitled to vote for churchwarden.

Where on an election of churchwarden several votes of women were taken in favour of the defendant and the plaintiff, the unsuccessful candidate, filed a bill to set aside the election on this, amongst other grounds, the Court though it dismissed the bill, refused to make any order as to costs; the unusual course adopted of females voting having invited inquiry, and the Court being of opinion that, under the circumstances, the defendant ought to maintain the right to vote at his own expense.

Statement

The plaintiff claimed to have been elected a churchwarden of St. George's Church (Toronto), at the last Easter Vestry meeting, by a majority of legal votes over the defendant *Farrell*, and filed this bill on behalf of himself and of all the other members of the vestry of St. George's Church except the defendants, against *Farrell* and the other churchwarden, *Boswell*, praying for a declaration that the plaintiff was duly and legally elected a churchwarden, and that if necessary a scrutiny of and inquiry into the validity of the votes given at the said meeting might be had, and that the defendants might be ordered to discover the names of the various persons who voted; and further, that *Farrell* might be restrained by injunction from continuing to act as churchwarden and from dealing with the goods and property of the church, and from excluding the plaintiff from the said office; that the defendant *Boswell* might be restrained from aiding and assisting the defendant *Farrell* in his wrongful acts, and that the defendants might account with the plaintiff for their dealings with the church property.

The votes objected to by the plaintiff were those of *John Judah* as not being a pew-holder or seat-holder at the date of the vestry meeting, and held no certificate from the churchwardens; of *Charles Heath* and *John MacNab* as not being owners or holders of pews or of

sittings within the meaning of the statute; of Messrs. *W. J.* and *A. Baines*, who claimed as heirs of their father, *Thomas Baines*, who had been the owner of a pew and died intestate, and neither of them being his eldest son; of *W. B. C. Barber*, as he occupied a pew by the license of his mother, who was the owner; of *Huson W. M. Murray* who claimed a right to vote in regard to two pews, on one of which his mother voted, and as to the other he was in the same position as Mr. *Barber*, occupying by permission of the true owner; of Judge *Duggan* and *Francis Cayley*, as being voluntary grantees of parts of a pew owned by the Hon. *William Cayley*; and of four ladies, on the ground that women have no right to vote. Objection was also made by the bill to the votes of *R. T. Fuller* and *Francis Arnoldi*, but this was abandoned.

The cause came on for examination of witnesses at a special sitting of the Court at Toronto, in January, 1876. The effect of the evidence is stated in the judgment. Argument.

Mr. *Moss* and Mr. *Hoyles* for the plaintiff. The mode of electing churchwardens is clearly pointed out by the Statute 3 Vic. Chap. 74, Sec. 3 (1840). In the present instance no proper record was ever kept of the parties entitled to vote, and the vote in question was taken upon a list prepared by the defendant *Farrell* himself several years before; since which time no entries were made of the changes which had taken place either by death or by persons parting with their interest. In fact the records of the vestry were not made up until after the list itself was completed. Section 2 of the Act settles clearly what constitutes a member of the vestry. The persons duly qualified are: (1) those who hold pews by purchase, (2) those who hold by lease, and (3) those who hold sittings only from the churchwardens.

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Mr. *J. Hillyard Cameron*, Q. C., and Mr. *H. M. Murray*, for defendant *Farrell.* The plaintiff is not in a position to file this bill for the purpose for which it is filed, even if the Court has jurisdiction to entertain it at the instance of any one, which we submit it cannot. The only object for which this plaintiff could properly file a bill would have been to restrain the defendants acting until a mandamus could have been obtained, and which would have been the proper and only proper mode of obtaining the relief he is seeking, there being really no mode of testing the matter in question except by that writ in a Court of law. The Administration of Justice Act has not altered the mode of proceeding in this respect, nor has it conferred upon this Court jurisdiction to try such a case. Again the plaintiff has not such a *status* as would entitle him to institute such a proceeding. There are four classes only duly qualified to do so, viz., those who hold under deeds; those who hold under leases from the owners; those who hold under leases from the churchwardens and those whose claims depend upon certificates obtained from those officers; and the plaintiff does not fill any one of these positions. That a pew can be apportioned into different sittings is clearly established by *Harris* v. *Drewe*, (*a*) *Brunskill* v. *Harris (b) Ridout* v. *Harris (c)*, *Prideaux* on Churchwardens pp. 314, 317.

Argument.

Mr. *Stephens* for defendant *Boswell*, submitted to any decree the Court might make.

The other points taken sufficiently appear in the judgment.

Judgment.

PROUDFOOT, V. C. [After stating the facts as above set forth.] The principal defendant, *Farrell*, submits that the plaintiff was not a member of the vestry; that this Court

(*a*) 2 B. & A. 164. (*b*) 1 E. & A. 322.
(*c*) 17 U. C. C. P. 88.

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has no jurisdiction to order a scrutiny of the votes taken at the election; that the plaintiff should have proceeded by writ of mandamus, and that if a bill were proper, it should have been by the plaintiff alone and not on behalf of all the other members of the vestry but the defendants, but only on behalf of those who voted for him; and submits that the persons objected to had legal votes, and offers, if the Court has jurisdiction, to submit to a decree voiding the election, and that the plaintiff should pay costs.

The Temporalities Act, 3 Vic. ch. 74 sec. 2, enacts that all pew-holders, whether holding the same by purchase or lease, and all persons holding sittings therein by the same being let to them by churchwardens, and holding a certificate from the churchwardens of such sitting, shall form a vestry for the purposes in the Act mentioned.

Judgment.

The 7th section enacts that in case of the absolute purchase of any pew the same shall be construed as a freehold of inheritance, not subject to forfeiture by change of residence, or by discontinuing to frequent the same; and the same may be bargained, sold, and assigned to any purchaser thereof, being a member of the Church of England, who, provided it be duly assigned and conveyed to him, shall hold it with the same rights and subject to the same duties and charges as the original purchaser.

The 9th section declares the duties of the church wardens, and in case they shall make default in yielding an account of moneys received by them to the succeeding churchwardens, these may proceed against them at law or file a bill in equity for discovery and relief.

The discovery sought for by the bill has been obtained

1876. during the progress of the cause, and the list of voters or copy of the poll for election of peoples' churchwarden is produced, shewing that 38 votes were polled for the defendant *Farrell*, and 36 for the plaintiff; and no objection to any other voters than those mentioned above has been suggested by the plaintiff.

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On the question of jurisdiction, I do not entertain any doubt that a bill for such an object as sought here will lie. The plaintiff, alleging himself to be churchwarden, asks for an account; his title is denied, and to prove his title it may be necessary to investigate the legality of his election. The 9th section of the Act gives concurrent jurisdiction to this Court with the Courts of law. But the Administration of Justice Act, 1873, sec. 32, enacts that no objection shall be allowed to any suit in Chancery upon the ground that the subject of the suit is exclusively or properly cognizable in a Court of law. If there be a remedy of any kind at law, this statute, by removing any objection to the jurisdiction of this Court, in effect confers the jurisdiction. To say that there shall be no objection to the proceeding on that ground, is in effect to say that the suit may proceed, and relief be afforded.

Judgment.

As to the objection on the ground of form, that the plaintiff has no right to sue on behalf of any of the members of the vestry except those who voted for him; I apprehend it comes too late at the hearing, as, independently of the Administration of Justice Act, 1873, sec. 50, the Court would have permitted the amendment, and certainly under that section I would not refuse it.

To come now to the voters objected to. The first is, Mr. *Judah*. The vestry meeting was on Easter Monday, 29th March, 1875. On that day Mr. *Judah* rented pew No. 9 for three months from the 1st April. He had not before been a pew-holder. He had applied to

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the sexton for it on Good Friday, and occupied it on that day and Easter Sunday. The sexton told him he could have the pew. The vote was admitted on his stating he had a receipt, but had it not with him. He did not state for what time he had rented.

I apprehend this vote is bad. At the time of the meeting, although Mr. *Judah* had applied for a pew, he was not a pew-holder. His right as such only began on the 1st April.

Mr. *Heath*, Mr. *Murray*, and Mr. *Barber* may be classed together. Mr. *Heath* occupies a pew belonging to the estate of Mrs. *Boulton* with the assent of the trustees, the acting trustee paying the rent and charging it against his interest in the estate. Mr. *Murray*, in regard to Mr. *Perkins's* pew, occupies it with his permission and leases from the churchwardens. Mr. *Barber* rents the pew occupied by him from the churchwardens—the real owner is said to be his mother, Mrs. *Barber*, as devisee under his father's will, and he occupies it with her assent.

Judgment.

It is not disputed that a pew may be leased by parol from year to year, but it is contended that the pews in question could not be leased by the churchwardens, as they had already become the property of individuals, and that they were the only persons entitled to vote upon them.

In England, where the right to a pew is of a much less extensive and absolute character than it is here, a person occupying with the assent of the owner and paying ground rent may acquire rights that he can enforce. *Parker* v. *Leach* (*a*).

The permission here given by the owners to the occu-

(*a*) 4 Mo. P. C. N. S. 180.

1876. pants would amount to a license to the churchwardens to lease to them, and they would be the persons entitled to vote.

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In my opinion the objections to these votes fail.

Mr. *MacNab* has leased half a pew from the churchwardens—that is, he has sittings for three, the pew holding six. The Statute draws a distinction between a lease of a pew, which I suppose means a whole pew, and the permission to hold sittings in a pew. In the former case a verbal lease suffices; in the latter the sitter must hold a certificate from the churchwardens of such sitting. Reasons may be found for the distinction, but with that I am not concerned, the law is plainly so written. But no form is given for the certificate; any thing to shew that the sitters hold by leave of the churchwardens is all that is required. A receipt for the rent would suffice. Mr. *MacNab* says he has such receipts but they do not seem to have been produced, and he does not recolleet by whom they were signed. Mr. *MacMurray*, it seems, is the owner of the pew, but he has expressly authorized the churchwardens to let it. In the absence of any receipt for the rent, or of any other certificate, I think I must hold this vote bad.

Judgment.

The Messrs. *Baines* stand in a peculiar position. The pew was owned by their father, who died intestate 8 or 9 years since, and they claim the pew or a portion of it by inheritance, and they have paid rent for it. For I think I must take it to be correct that *William* has paid for *Allan* under an agreement to be repaid, as sworn to by *Allan*.

It is contended, however, that the Act abolishing primogeniture defines land to mean any estate *held in fee simple, or pur autre vie*, and an estate in a pew

is not a fee simple, for which *Ridout* v. *Harris* (*a*) is cited.

The Temporalities Act, sec. 7, enacts that in the case of the absolute purchase of any pew the same shall be construed as a *freehold of inheritance*, and Blackstone vol. 2, p. 104, says that freeholds of inheritance are divided into inheritances absolute or fee simple, and inheritances limited, one species of which we usually call fee tail. *Freehold of inheritance* is the general name, and includes in it an estate in fee simple; it no doubt also includes a fee tail, to which the Abolition of Primogeniture Act does not apply. But I apprehend that *fee simple* is the sense to be ascribed to them here. At that time (1840) there was no means by which the rights of issue or remaindermen even in an entailed estate could be docked. A freehold of inheritance capable of sale and conveyance then must have been a fee simple.

Judgment.

Nor do I think the extent of the estate diminished by the qualification, that the purchaser must be a member of the Church of England. Doe *d. Gill* v. *Pearson* (*b*) where the devise was to *Ann* and *Hannah*, their heirs and assigns for ever as tenants in common, upon condition that they or she having no lawful issue shall have no power to dispose of her share in the estates *except to her sister or sisters or to their children*, and the condition was held valid, and that the estate was a fee simple. Nor does the case of *Attwater* v. *Attwater* (*c*) overrule this. The condition there was an "injunction never to sell it out of the family; but if sold at all it must be to one of his brothers hereafter named," which the Master of the Rolls construed to be an injunction never to sell the lands at all. The words, *out of the*

(*a*) 17 C. P. U. C. 88.
(*b*) 6 East 173.
(*c*) 18 Beav. 330.

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family, were descriptive of the effect of the sale, not of the persons to whom it might be sold. The permission to sell to the brothers named was too restricted, as they might be so selected as to render it reasonably certain they would not buy the property.

Here the qualification merely expresses, what without it must nearly always have been the fact, that the purchaser must be a member of the Church of England.

Ridout v. *Harris* (*a*) decided nothing as to the nature of the inheritance of a pew; but that the right being of an incorporeal nature possession of it could not be given by the sheriff, and, therefore, that ejectment was not the proper form of action.

Upon Mr. *Baines's* death intestate the estate in the pew descended to all the children, and in the character of heirs they have a tenancy in common in it; and *W. J.* & *A. Baines's* votes are, therefore good.

Judgment.

Judge *Duggan* and *F. Cayley* have been granted by the Hon. *W. Cayley* several portions of the pew on which they voted. The objection is, that a pew cannot be apportioned, and that the deeds were voluntary; the only condition being that the grantees should pay the ground rent, a condition which the law would impose on the grantees, and therefore not diminishing the voluntary nature of the grant.

In England the pews as part of the freehold are vested in the incumbent for the use of the parishioners, and although they may be granted to particular persons for their exclusive use it is merely the right or easement to occupy the pews during divine service. The grantee acquires no property in them. *Jarratt* v. *Steele* (*b*).

(*a*) 17 C. P. U. C. 88. (*b*) 3 Philli. 167.

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Yet such a right might be apportioned, and where a pew was granted to one and his family forever, and the owners and occupiers of a certain dwelling, and the dwelling was afterwards divided into two, it was held that the occupier of one of the two, consisting of a very small part of the original messuage, had some right to the pew and might maintain an action against a wrong doer. *Harris* v. *Drewe* (*a*). The argument is *a fortiori* here in favour of the apportionment. The 7th sec. of the Temporalities Act was intended to enlarge the estate of the pew owner beyond what it was in England, and relieves it expressly from liability to forfeiture by change of residence, or by discontinuing to frequent the same, which were incidents to the English ownership; and then proceeds to give the right to bargain, sell, and assign to any purchaser being a member of the Church of England, giving an additional power to the owner, who in England had no right to sell. This was intended to confer a beneficial ownership on the pew-holder, to vest him with an alienable right of property, and I cannot infer a limitation that it should only be aliened for value because the words bargain and sell are used. The word assign is also used, and I conceive that a devisee may be entitled to a pew under a will, and indeed the plaintiff's argument against Mr. *Barber's* vote is, that the pew passed by will to his mother. This could not be if it could only pass by bargain and sale for value. I apprehend the property was intended to be capable of being dealt with, having regard to the subject, as any other property might be, and unless these transfers were merely colourable, and intended to be held in trust for the grantor after serving a purpose, I see no reason for not holding them valid. Here the churchwardens were notified of the transfer.

Judgment.

But I am by no means satisfied that the condition of

(*a*) 2 B. & Ad. 164.

1876. paying the ground rent is not a sufficient consideration. Mr. *Cayley* no longer required the extent of accommodation he had, and to relieve him from the rent was conferring a benefit on him. I think both these votes are good.

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I now proceed to the last class of voters whose votes are objected to; the four ladies. Their votes are not questioned, if they are not under a disability from exercising them. The learning and research of the counsel who argued this case failed to discover any instance in which the precise point had been decided. The cases of *Chorlton* v. *Lings* (*a*) and *Regina* v. *Harrald* (*b*), in the former of which women were decided to be under a legal incapacity of voting for members of Parliament, in the latter, of voting for town councillors, were referred to as decisions from which an analogy might be derived adverse to their right in this case. Political and municipal considerations may afford reason to justify the disqualification, which would not apply here, and in many cases it might be more reasonable that one or both churchwardens should be women than men. One half the congregation are likely to be women, in many cases much the larger proportion may be, and a female overseer would be able to watch over their conduct, to counsel and advise them, better than men. It may be considered then, that unless a disqualification be expressly imposed women should be eligible to the office, and if they could fill the office they should be able to vote for candidates. But it does not seem to me to be an essential condition that voters should be qualified to fill the offices for which they may vote.

Judgment.

The Temporalities Act, sec. 2, enacts that all pewholders and all persons holding sittings shall form a vestry. Certainly women may hold pews and sittings,

(*a*) L. R. 4 C. P. 374. (*b*) L. R. 7 Q. B. 361.

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and unless something in the Act or the general law should impose a disqualification they have the right to vote. The only instance in which the masculine is used in reference to pew-holders and sitters is sec. 8, which declares that they "shall have a right of action against any person injuring the same or disturbing *him* or *his* family in the possession thereof." But without any interpretation Act the phrase is evidently generic, and includes females. Can it be supposed that only *men* are to be protected from disturbance in the exercise of worship; if that be the true construction, then persons in the 2nd section must receive this construction and only men can be pew-holders or holders of sittings; and trace it a little further, if only men can be holders of pews and sittings, and they only are to be protected in the enjoyment of them, then women need not go to church, and the Legislature which could have passed such an Act must have been of the Mahometan persuasion, and believed, as commonly reported, that women have no souls. This phrase in the 8th section, does not, I think, help the plaintiff.

Judgment.

In *Anthony* v. *Seger* (*a*), Sir *Wm. Scott* says "If a parish had returned a Papist, or a Jew, or a child of ten years of age, or a person convicted of felony, I conceive the ordinary would be bound to reject." Had the disqualification of women been as notorious as contended for, it is curious that Sir *Wm. Scott* did not enumerate them among those who should be rejected.

In *The King* v. *Alice Stubbs* and others (*b*) it was held that a woman might be chosen overseer of the poor. The qualification required by the statute 43 Elizabeth is that they shall be *substantial householders*; it has no reference to sex, and there was nothing in the nature of the office to make a woman incompetent.

(*a*) 1 Hagg. Consist. R. 9. (*b*) 2 T. R. 395.

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In England the churchwardens were usually overseers of the poor, and if a woman might be an overseer the argument is very strong that she might be a churchwarden also. It was argued there also, as in this case, that there were some parts of their duties inconsistent with the decency of their sex. It was the duty of overseers to make inquiries relative to bastards and to carry the person charged before a magistrate to obtain an order of bastardy. Other duties were such as usually fall to the lot of men—making assessments for the relief of the poor, to set a value on property, to provide materials with which the poor are to be set to work, and inquire as to settlements. There is nothing in the canons of 1603 relating to the care of the church, and the detection and punishment of offences against good order and morality, more inconsistent with the decency belonging to the sex than those imposed on churchwardens. But the Court overruled the objection as to the one, and it should not prevail as to the other. The Court also said, "There are many instances where in offices of a higher nature, they are held not to be disqualified; as in the case of the office of high chamberlain, high constable, and marshal, and that of a common constable, which is both an office of trust and likewise in a degree judicial." And so in the case of the office of sexton. *Olive* v. *Ingram* (*a*). *Prideaux*, Churchwardens, 5, —.

Judgment.

From *Rex* v. *Stubbs* (*b*) and *Olive* v. *Ingram* (*c*) there may perhaps be some grounds for contending that a woman is not exempt from this duty. But however this may be in point of law, there can be no doubt that the Courts would relieve her from the burden of serving, unless the necessity of the case required that she should do so. And in the list of disqualifications at p. 8 no

(*a*) 7 Mod. 263, 2 Str. 1114. (*b*) 2 T. R. 395.
(*c*) 2 Str. 1114.

mention is made of women. See also 1 *Burns's* Ecclesiastical Law 399, 1 *Stephens'* laws relating to the clergy, 334. *Roger's* Ecc. Law 243, 244.

In *Hutchins* v. *Denziloe* and *Loveland* (*a*), Lord *Stowell*, speaking of the duties of churchwardens says, "I conceive that originally they were confined to the care of the ecclesiastical property of the parish, over which they exercise a discretionary power for specific purposes. In all other respects it is an office of *observation and complaint, but not of control*, with respect to Divine worship. * * In the service they have nothing to do but collect the alms at the offertory," &c. This description of their duties disposes of the objection that "It is a shame for women to speak in the church," 1 Cor. xiv. 35; and "I suffer not a woman to teach," 1 Tim. ii. 12.

Judgment.

On the whole, I conclude that these ladies had the right tovote .

The result of this inquiry is, to strike two votes from the number polled for the defendant *Farrell*, and thus puts him on a par with the plaintiff; and the plaintiff has not established that he had a majority of votes, and is, therefore, not entitled to maintain this suit. I do not think the plaintiff entitled to ask for any further scrutiny. He has had an opportunity of putting his finger on any blots in the election, and has objected to a number of votes, and the scrutiny so far as he is concerned ought not to be permitted to extend farther. Had my conclusion been against the defendant, it might be questionable whether a scrutiny should be permitted to him of the voters for the plaintiff. If he intended to rely on the want of jurisdiction in this Court to make such an inquiry he should have demurred. But having answered

(*a*) 1 Hagg. Con. 170, 173.

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without making any specific objections to votes given for the plaintiff, and adduced no evidence in support of them, I think that strictly he should have been precluded from asking a scrutiny. Such a matter is not referred to the Master; it is examined by the Judge at the hearing. But if the omission had arisen from a mistake of the practice, I would have given an opportunity of setting it right.

Judgment.

I have already said that the Court, in my opinion, has jurisdiction in such cases. Other instances might be referred to where, in the ordinary proceedings of the Court a scrutiny may be incident to the relief sought: *West Gwillimbury* v. *Simcoe* (*a*). And so in determining who are contributories under the Winding-up Act, 25 & 26 Vic. ch. 89, sec. 35 et. al., 1862. And in our own Court bills have been filed in which it was necessary to determine which of two sets of boards of railway directors was duly elected (*b*), involving a scrutiny of votes attended with as much intricacy, and more than is found in this case: and proceedings are now pending to determine whether a congregation of Presbyterians has by a majority of legal votes voted itself out of the Union recently effected by statute. The mode of procedure may be different from that upon a mandamus, but I do not think it less efficient. The proceeding by mandamus where the return is traversed or pleaded to, leaves the qualification of voters to be tried by a jury or a Judge at the Assizes; it is in the nature of an action, and has to be tried in the same way: 3 Bl. Com. 265, *Reg* v. *Allen* (*c*). Imp. Stat. 9 Anne ch. 20, 1 Wm. IV. ch. 21. sec. 3. Stat. of Can. 28 Vic. ch. 18, sec. 3 (1865). The remedy in this Court is as speedy, and there is nothing in the machinery or practice to prevent the decision being as accurate.

(*a*) 20 Gr. 211.
(*b*) McClennaghan v. Buchanan, 7 Gr. 92.
(*c*) L. R. 8 B. R. 69.

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I have not hitherto discussed the objection to the *locus standi* of the plaintiff, and I only refer to it now as it may have an influence on the question of costs. If he is not entitled to file the bill it should be dismissed with costs, no matter how irregular the election may have been.

The objections are that he is not a pew-holder, having given notice that he did not intend to rent his pew beyond the 1st of the present month. At the time when the hearing of this case was last adjourned, I understood that the rights of the parties were to remain as if heard then, *i. e.*, before the 1st of January. I decline to give effect to this objection.

Another objection, I infer from the cross-examination of the plaintiff, is that he has not presented himself to the incumbent to be sworn in. But this was not alluded to in the argument, probably because it was untenable: *Tapping* on Mandamus; and I conclude it was abandoned.

Judgment.

The last was, that if his objection to the votes of several voters for the defendant were good, such as *Heath*, *Murray*, and *Barber*, he was in the same position, having rented from the churchwardens a pew belonging to Mrs. *Boulton*. But as I have determined that these votes were good, on the same principle I must hold the plaintiff to be a member of the vestry.

The bill must be dismissed, but it is not a case for costs. The unusual course adopted, of ladies voting, invited inquiry, and though I think them entitled to vote, the defendants have no reason to complain of having to maintain that right at their own expense.

1876.

Re RITCHIE, SEWERY v. RITCHIE.

Work and labour—Administration—Further evidence—Practice.

The mere fact that one brother performs for several years work for another, will not raise the presumption of a promise to pay. Where, therefore, the evidence before the Master was, that the claimant had worked in the mill of the testator (his brother) from the year 1861 till 1874, without any express agreement for wages, but the testator had promised *to be faithful* to the claimant, the Master refused to admit the claim, and this ruling was, on appeal, affirmed by the Court.

Where in an administration suit an alleged creditor was examined before the Master, but failed to establish his demand, the Court on affirming the Master's finding refused a reference back in order to afford the party an opportunity of calling other evidence to establish his demand.

Dec. 16, 1875.

Statement.

Under an order for the administration of the estate of *John Ritchie*, an advertisement issued for creditors, and *James Ritchie*, his brother, filed a claim for $2,275 for work done from 1861 to 1874, after giving credit for $25 a year received during that period.

James Ritchie was examined in support of this claim, when he stated that there was no agreement with *John* for wages, that *John* promised *to be faithful to him*, and he expected that this would have been fulfilled by his leaving him property by will. He stated also that he was a partner with *John*, *all but the writings*. The Master at Barrie rejected the claim. *James Ritchie*, then applied, after the closing of the evidence, to the Master to be at liberty to adduce further evidence, as it would seem for the purpose of having an opportunity of explaining by his own evidence the nature of his arrangement with *John*, to shew that he was to receive one-third of the *tolls* for gristing—they were millers—and that he was not to be liable to any loss, and that therefore this was a mode of computing his wages, not creating a partnership.

1876.

Sewery. v. Ritchie.

The Master refused to permit it. *James Ritchie* thereupon appealed from the decision of the Master, both for rejecting the claim and for refusing to receive further evidence of it.

Mr. *Moss* for the appeal.—The demand of *James Ritchie*, the claimant here, has not been met by counter evidence of any sort. His evidence shews that he was to receive one-third of the tolls of the mill as payment for his services—not that he thereby became a partner with his brother. The evidence here shews that the work and labour were done, and what that service was worth. This throws upon the other side the onus of shewing one of two things, namely, something inconsistent with a claim for pay for the service, or that the work has already been paid for. The rule is clear that where work has been performed for another, it will be assumed that it was done at his request, and a promise to pay therefor will be implied. In a case like the present no presumption arises that the service is gratuitously rendered, as is the case between father and son during minority.

Argument.

Mr. *Hoskin*, Q. C., and Mr. *Mulock*, contra.—It is necessary before this claim can be allowed to establish an express contract of hiring, and the evidence of the claimant himself does not do so. Had the Master considered that the contract of hiring was established, he would, at all events, have taken the account of what would be due for the services for the years between 1868 and 1874, even although the claim for the prior years had been barred by the statute. *The Corporation of Longueuil* v. *Cushman* (*a*), *Reeve* v. *Reeve* (*b*), *Hingeston* v. *Kelly* (*c*), *Zealand* v. *Dewhurst* (*d*), *Whyatt* v. *Marsh* (*e*), were referred to.

(*a*) 24 U. C. R. 602.
(*b*) 1 F. & F. 280.
(*c*) 18 L. J. Ex. 360.
(*d*) 23 C. P. 117.
(*e*) 4 U. C. R. 485.

1876.
Sewery v. Ritchie.
Jan. 7.

PROUDFOOT, V. C.—I think the Master was right. *James*, in his affidavit, says that the agreement with *John* was made in 1872, by which he was to receive the third of the tolls; that it was only in force for a few months when he considered it abandoned, as *John* took the whole whenever he needed money. *William Ritchie* says he has heard both *John* and *James* talk of this agreement, which was to entitle *James* to the third of the tolls from the time of the grist mill being put up in 1868. They had previously only a saw mill from 1861 to 1868. There is no pretence of any agreement for wages while at the saw mill. *William* also proves that during the six years from 1868 to 1874, *James* was of much less use than before; he was in the habit of drinking, and frequently incapable of attending to his duty.

Judgment.

I agree with the appellant that, if the arrangement spoken of with *John* were made, it did not constitute a partnership *inter se*, whatever effect it might have as to third parties.

But the appellant contended that all he required to do was, to shew that he had worked for *John*, and that a promise to pay would be implied. That is probably the rule amongst strangers, but between near relatives, as parent and child, uncle and nephew, and, as here, between brothers, the law makes no implication, but an express hiring must be proved in order to support a claim for wages. *Rex* v. *Sow* (*a*); *Rex* v. *Stokesley* (*b*), Add. Cont., 6th Ed., 364.

The claimant's own evidence impresses me with the conviction that he was not serving under any agreement for wages, but in the expectation of receiving some benefit under his brother's will. *John promised to be faithful to him*, and he was disappointed when he was not bene-

(*a*) 1 B & Ald. 181. (*b*) 6 T. R. 757.

fited to a larger extent by *John's* will, for *John* was faithful to him in leaving him a joint residuary legatee with *John's* own daughter.

The evidence of any agreement is eminently unsatisfactory. *James* says it was made in 1872, but does not say that it was to apply before that time. The only corroboration of that is, the evidence of *William*, who speaks of having heard this talked about by *James* and *John*, but according to him it was to refer back to 1864. I would not have thought the evidence sufficient of itself to establish such a claim as the present; but when *James* tells us this was only in force for a few months and that he considered it abandoned, it is out of the question to enforce such an abandoned agreement out of the estate.

I think the Master acted judiciously in refusing to admit the further evidence. It would not be a wise discretion to permit the claimant to endeavor to make a new case, or to fortify a weak one by going again into the witness box. He was there once, and might have told his whole story then. But the evidence he wishes to give is, to prove he was not a partner, and as in that I agree with him, it would be useless to give him a chance of proving what seems to me to be already established.

Judgment.

It is not necessary to discuss the question of the Statute of Limitations, and others raised in the argument.

The appeal is dismissed with costs.

1876.

WATSON v. WATSON.

Undue influence—Improvident bargain—Costs.

The plaintiff an infirm man, 75 years old, and nearly deaf, having quarrelled with a son in whose house he had for some time resided, conveyed by deeds, which did not contain any power of revocation, all his property and effects, worth about $6,000, to another son, the defendant, with whom he went to live, the plaintiff receiving back at the suggestion of the person employed by the father to prepare the deeds, a bond in $2,000 penalty, securing to the father a maintenance or $125 a year, in the event of his being unable to continue to reside with the defendant, but which did not charge the amount on the realty in any way. On a bill filed by the father to be relieved from the transaction so entered into, the Court, on the ground of the extreme improvidence of the bargain, and that the instruments did not, as the plaintiff swore, carry out his real intention, set the transaction aside; but the bill having improperly charged the defendant with having fraudulently practised upon the plaintiff, and with having, by undue influence procured the deeds to be executed, this relief was granted without costs.

Dec. 20, 1875.

Statement.

This was a bill filed by a father against his son, *William John Watson*, to set aside two conveyances of land made to him on the 9th of March, 1874; one parcel being in the township of London, and the other in the township of West Nissouri, each containing about fifty acres, and being of about the same value. The plaintiff alleged that he was subject to fits of mental depression, during which he was not competent to transact intelligently his business, and that while suffering from one of those fits the defendant obtained these conveyances from him by undue influence, giving back only his personal obligation to furnish and provide the plaintiff with proper food, clothing, and medical attendance during the period of his natural life, or in case they could not live in harmony to pay to the plaintiff $125 per annum during his life.

The cause came on to be heard before Vice-Chancellor *Proudfoot* at the autumn sittings of 1875, in London,

when the learned Judge stated that in his opinion the evidence failed to establish the incapacity of the plaintiff or any undue influence exercised by the defendant, but gave leave to amend the bill, reserving the costs to the hearing. 1876. Watson v. Watson.

The bill was afterwards amended, and alleged that the plaintiff was an aged and infirm man, 75 years of age, totally deaf and unable at the time of the impeached transactions to hear or understand their nature and effect, and was induced without due warning or consent to give away the whole of his available property and all his real estate, worth more than $6,000, for a consideration little more than nominal; and no explanation was given to him by any independent legal adviser, or any one competent to advise him of the effect of the transaction, and that, in any event, the transaction was so improvident on his part that it ought not to be allowed to stand. That the plaintiff did not understand and was not informed that the effect of the transaction was to deprive him of all his property and estate, and leave him without means sufficient for his support clothing and maintenance; and was not informed and did not understand that the bond did not bind the land and could not be registered. Statement.

The defendant answered the amended bill, admitting the plaintiff's age, that he was comparatively deaf, and physically infirm, but alleging that at the time of making the conveyances he could hear distinctly when spoken to loudly, and was warned thoroughly by an adviser of his own selection of the effect of the conveyances, and fully understood the effect of the bond, and was as capable of judgment as at any time during his life.

That by the mistake of the person who was selected by the plaintiff, and who drew the bond, it was omitted to charge the land, of which defendant was ignorant till

1876. the hearing of the cause, and that since the hearing he had caused a proper bond to be prepared and tendered to the plaintiff for the same purpose, and making it a lien on the land, which was refused.

Watson v. Watson.

That if the sum in the bond should, in the opinion of the Court, not be sufficient for the maintenance, &c., of the plaintiff, defendant was willing and offered to execute a new one, for a sufficient sum.

The case was heard upon the amended pleadings, without any new evidence.

The evidence shewed that the lot in the township of London was the plaintiff's homestead, where he had lived many years. That defendant left home and went to reside on the lot in Nissouri, which it appeared was always intended to have been for him, about twelve or thirteen years since; and about four or five years since the plaintiff leased the homestead to his son *Richard* for five years, reserving to himself a rent of $50 a year and his support and maintenance upon the said lands during the term.

Statement.

About eight years since the plaintiff made a will, by which the Nissouri lot was given to defendant, and the homestead, with stock, implements, and household furniture was given to *Richard;* and Mrs. *Dunlop*, plaintiff's daughter, was to get $400, to be paid to her by *Richard.*

Richard and his wife being, or professing to be alarmed at the conduct of the plaintiff, and apprehensive for their safety, *Richard* convened a family meeting, a sort of council, to arrange for the future maintenance of the plaintiff, and to make a settlement between his father and him. *Richard* said, neither he nor his wife could live with plaintiff: they were afraid of him.

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At this meeting, the defendant and his wife, *Richard* and his wife, *Dunlop* and *Coleman*, two sons-in-law of plaintiff, and their wives, and the plaintiff, were present.

Dunlop was examined—he stated, "*Richard* proposed to give up the place if the plaintiff would give him $1,000. I told plaintiff what *Richard* said; plaintiff asked why he had not been told this before. I told him he had better make some settlement and go and live with some of the others. *Richard* said if plaintiff stayed there he would have to leave. * * * I did not offer to take the plaintiff. *Coleman*, I think, said he would not take and keep him for the place, if he had as much trouble as *Richard* had with him. The defendant said plaintiff would have to go with him. * * * To support the plaintiff among strangers, and pay for care and maintenance, could not be got for $150 or $200 a year. *Richard* offered that day $150 to any one who would keep him."

Statement.

Mrs. *Dunlop* said, that at the family meeting "I did not offer to keep plaintiff, nor did *Coleman*, his wife, nor my husband. Something was said that they would not take the farm and keep the plaintiff. *Richard* said he would have to leave because he could not live with plaintiff."

The defendant, *Richard* and his wife, and the defendant's wife were also examined as to what took place, and all substantially agreed in what is narrated above.

The plaintiff went home with the defendant the evening of the meeting, in the beginning of March, 1874, and some four or five days afterwards the deeds in question were executed.

Mr. *Boyd*, for the plaintiff, referred to *Beeman* v.

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Knapp (*a*), *McConnell* v. *McConnell* (*b*), *Campbell* v. *Belfour* (*c*), and *Hughes* v. *Seanor* (*d*), as establishing clearly the right of the plaintiff to be relieved from the effects of the deeds which had been obtained from him under the circumstances appearing in the evidence in this case. In *Beeman* v. *Knapp* the circumstances were very similar to the present case.

Here the bond given by the defendant does not bind the land in any way; this, it is true, the defendant admits was an error; but the question very naturally suggests itself to the mind—was it so by mistake, or was not the instrument made in the form it is intentionally?

Then the Court will look at the improvidence of the transaction as evidenced by the writings themselves, and also at the fact that the deeds contain no power of revocation, as proof either of undue influence on, or the want of proper knowledge by the grantor. In either view he is entitled to the aid of the Court: *Coutts* v. *Acworth* (*e*). *Wollaston* v. *Tribe* (*f*), *Rhodes* v. *Bate* (*g*), *Henshall* v. *Fereday* (*h*).

Argument

The evidence establishes with sufficient certainty that the old man was not thoroughly himself when executing the instruments; and was, owing to the state of his mind and feelings as well as his advanced age, in a position requiring to be particularly informed and advised as to the nature of the deeds he was about to execute, and the very important effect they were certain to have on his interests. But nothing of this kind is shewn to have been done, and it is evident from the evidence of the plaintiff himself, that he was and now is, of opinion that

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(*a*) 13 Gr. 398.
(*b*) 15 Gr. 25.
(*c*) 16 Gr. 108.
(*d*) 18 W. R. 108.
(*e*) L. R. 8 Eq. 558.
(*f*) L. R. 9 Eq. 44.
(*g*) L. R. 1 Ch. at p. 257.
(*h*) 21 W. R. 240, 570.

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the writings afford him much greater benefits than they really do.

Mr. *McMillan*, for the defendant.—The evidence adduced shews that the plaintiff was perfectly capable of understanding and appreciating the effect of the transaction he was entering upon; and there can be no doubt that he was greatly troubled and annoyed by being refused a home at the house of his son *Richard*, with whom he had resided for some years; and all his children, other than the defendant, declined to assume the responsibility of attending to his support and maintenance; and under these circumstances it cannot be wondered at that the father desired to benefit the defendant in preference to any of the other members of his family; and there is no doubt that had the old man been left to his own feelings on the subject no complaint would ever have been made by him, or the present suit instituted.

Argument.

In considering the value of the property conveyed, the Court must necessarily keep in view the very important fact that one half of it was always considered and looked upon as being the defendant's own lot, and it is possible that his claim to it was such that this Court would have enforced it; at all events no one can doubt for a moment that he had a strong moral claim to it, whatever may have been his legal rights. The case of *Beeman* v. *Knapp*, was very different in its circumstances from this. There the grantor was entirely without advice or assistance of any sort; here he had the advice of the man of his own choosing, who refused to draw the conveyance for the second parcel of land until it was arranged that the son should execute a bond guaranteeing the support and maintenance of his father. True it is, the bond does not expressly charge the land to that extent, but this Dr. *Stevenson*, who prepared the writings, says was omitted by mistake. There exists here really no ground whatever for imputing bad faith or charging undue in-

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fluence against the defendant. *Toker* v. *Toker* (*a*), is an authority in favour of the right of the defendant.

Mr. *Boyd*, in reply.—The improvidence of the transaction is alone sufficient to induce the Court to say it shall not be allowed to stand.

Jan. 7th.

PROUDFOOT, V. C.—I think it is satisfactorily established that the plaintiff immediately, or soon after, reaching the defendant's, formed the design of disposing of his property in the manner afterwards intended to be carried out. He was offended at having been turned off by *Richard*, and that the other members of his family had refused to receive him. He told the defendant to get some one to draw deeds for him; to go for Dr. *Stevenson*, and if he would not come, to go to St. Mary's for a lawyer.

Dr. *Stevenson* it seems had studied law before practising as a physician.

Judgment.

The defendant says, and I believe him, that he did not know the precise nature of the disposition the plaintiff was going to make, he thought what the plaintiff wanted was a will.

The defendant brought *Stevenson*, who lived about six miles off. The plaintiff told him he was going to give the defendant the farm on the 6th concession—the homestead—and to give him a deed of the West Nissouri lot. Dr. *Stevenson* pointed out to him that he was deeding away everything he had, and that he had made up his mind never to draw a deed from father to son without making a bond back. Plaintiff said he was willing to do it, willing to trust his son. The doctor told him he should not sign a document, unless he got a bond back.

(*a*) 31 Beav. 639.

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The doctor then drew the deeds in question, and a will disposing of his personal property, of small value, and a bond, and sent the defendant for a witness. He says the deeds and bond were read over to the plaintiff before the witness came and afterwards, that he read them himself and plaintiff heard every word. The consideration stated in the deed was inserted by the doctor without instructions from the plaintiff. The bond was intended to be drawn to secure an annual sum of $120, being 6 per cent. on what the doctor assumed to be the value of the homestead, $2,000, but was by mistake drawn for $125. The penalty is $2,000, and a line is left out, the doctor says, also by mistake, so that it is not made a charge on the land. The reason why only the value of the homestead was taken into account, was, that the defendant seems to have been considered entitled to the other, as it had been designed for him by the former will. This will was burnt after the second was executed. The plaintiff gave all the directions both as to will and deeds; none of them came from the defendant. He read the deeds himself as well as heard them read. The doctor is quite positive the plaintiff knew the effect of the documents. He assigned as a reason for making them that he wanted to live with the defendant, that he could not live with *Richard*.

Judgment.

I think the doctor is in error in supposing that the plaintiff heard all that was read to him. The defendant admits that he could not hear Dr. *Stevenson* read the papers, at least, not all of them. I do not doubt, however, that the plaintiff read them, or appeared to read them. Dr. *Stevenson*, his wife, the defendant, and *Thompson* the witness, all speak of his appearing to read them.

There is no power of revocation in these deeds—none was spoken of or suggested by Dr. *Stevenson*—the whole security designed by him for the plaintiff was the

1876. bond. Several witnesses establish that the sum mentioned in it, $125 per annum, is quite inadequate to board and provide for the plaintiff.

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The plaintiff was examined before me. He was so deaf that questions were put to him in writing. He read them readily without spectacles, and gave intelligent answers. He did not appear more infirm than persons of his age usually are. He said he knew when he made the deeds he could not get the place back, but he thought that with the bond he was getting $2,000. In reply to a question, if *Stevenson* told him he was to get $2,000 in addition to $125 a year, he said, *it is in the bond.*

This is an impression that would not improbably be made on the mind of a person not familiar with legal phraseology upon reading the bond. He would see, first, that the defendant bound himself to pay him the $2,000, and further that the $125 was provided for his maintenance. He was too deaf to hear explanations, and he says none were given to him. I suppose he did not hear them, or did not understand them. None seem to have been given to him in writing.

Judgment.

My conclusion from the whole evidence is, that these papers do not carry out the intentions of the plaintiff. He had come to live with defendant, and expected to continue there, and although he may have been confiding enough to trust the defendant at a moment when all the other members of his family had deserted him and refused to keep him, it was the duty of the conveyancer to have seen this properly secured. The plaintiff was disposing of his whole property, and reserving to himself a provision quite inadequate for his support, unless the $2,000 be taken into consideration, and this is not made a charge even on the property he was parting with. I also think he was under the impression that he was to receive the $2,000; and had these sums been

properly secured I would not have interfered with the deed.

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I do not place my decision on the ground that the defendant exercised any undue influence over the plaintiff, nor that the plaintiff was incapable of understanding the nature of the act he was doing ; but that no sufficient explanation of the nature and consequences of the act was afforded to him, nor any sufficient security taken for the interest the plaintiff intended and expected to be reserved for him.

The observations of *Mowat*, V. C., in *Hume* v. *Cook* (*a*), apply with much force here. "Not only was the consideration which *Hume* was promised totally inadequate, but, viewing the transaction as a means of securing to *Hume* a comfortable home for the remainder of his short life, the bargain was exceedingly improvident and defective in its details ; and to give validity to the transaction, if that were possible, it was necessary to have proved that the defects were considered by a competent adviser, and were shewn to *Hume* ; that he was made alive to them, and to the way of removing or alleviating them ; and that with his eyes open to all that was objectionable in the transaction, he voluntarily and deliberately, and without any pressure from *Cook* or influence of any kind on his part, determined to carry out the transaction as it stands. But there is no such proof." In that case *Hume* had given up all his property of greater value than $2,000, to *Cook* for a promise of support during his natural life and $20 a year, unsecured except by the bond of *Cook*.

Judgment.

In *Evans* v. *Llewellyn*, (*b*), a conveyance for an inadequate consideration, without fraud or imposition, by a grantor not accurately informed of his rights, was set aside as improvidently entered into.

(*a*) 16 Gr. 84. (*b*) 2 Bro. C. C. 150, S. C. 1 Cox 333.

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The counsel for plaintiff offered to confirm the conveyance of the West Nissouri lot, thus placing it as was intended by the first will, and as all parties seem to have considered it, as being rightfully the defendant's; he having always occupied it and made large improvements.

The decree will, therefore, confirm the deed of the West Nissouri lot, and declare the other ought to be set aside as having been made improvidently and under mistake, and the defendant will reconvey it to the plaintiff.

As the bill was originally filed charging the defendant with fraudulent conduct, and the exercise of undue influence, from which I have exonerated him, the evidence was all taken on that state of the record, but has been found available on the amended pleadings, I do not give costs to either party. I cannot give them to the plaintiff, who has made unfounded charges, nor can I give them to the defendant, who has insisted on the validity of what I have determined to be an impeachable transaction. I do not think the diposition of the costs ought to be affected by the confirmation of the deed of the lot in Nissouri. Whether the defendant had any such right to it as could be enforced in this Court I do not think it necessary to determine; but it is clear upon the evidence that he had occupied it on the understanding that it was to be his, had spent large sums and much labour in clearing or otherwise improving it, and had, to say the least, a very high moral claim to have the title to it confirmed.

Judgment.

STAUNTON, Plaintiff (*Respondent*,) v. THE WESTERN ASSURANCE COMPANY, Defendants, (*Appellants*). [IN APPEAL.*]

Insurance—Conflicting evidence.

The decree pronounced *ante* volume xxi., page 578, affirmed on Appeal; the Court being of opinion that the evidence warranted the decree which has been made, and shewed that the effect of all that had passed between the parties was to establish the payment of the amount of the renewal premium.

This was an appeal by the defendants from the decree of the Court below, as reported *ante* volume xxi., page 578, where the facts are clearly stated. Sept. 15th, 1875.

Mr. *Moss*, Q. C., and Mr. *Wells*, for the appellants.

Mr. *Attorney-General Blake* and Mr. *Lash*, for the respondent.

The points relied on and authorities cited appear in the former report and in the judgment of the Court on the present appeal.

DRAPER, C. J.—The plaintiff effected a policy of insurance (No. 33,191) with the defendants upon his stock of paper and materials contained in a brick building occupied by him as a paper printing factory in the city of Toronto, in the sum of $5,000, against loss or damage by fire, from 6th April, 1870, at noon, until 6th April, 1871, at noon. The defendants had notice of other insurances on the same property which the plaintiff had effected, one of which was with the Lancashire Insurance Co. Judgment.

* *Present*—DRAPER, C. J., STRONG, BURTON, and PATTERSON, JJ.

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The plaintiff had also another insurance with defendants (No. 39,295) on certain buildings in Toronto, being part of what was known as the Iron Block.

In February, 1872, there was a fire by which the Iron Block was damaged, as well as the goods in the factory, and certain sums were paid, or agreed to be paid, to the plaintiff for the loss of the goods. The damage to the buildings remained unsettled ; the defendants and the other insuring companies offered him $8,000, informing him that if he would not accept that sum they would reinstate the premises.

In October, 1870, the plaintiff borrowed $16,000 from the defendants, and to secure them assigned to them certain lands and premises, of which he was lessee for a term of years. The money was to be replaced at the expiration of three years, with interest half yearly. On 20th December, 1871, plaintiff charged the same land and premises with a further sum of $4,000, and interest, giving also collateral security. In the mortgage the plaintiff covenanted that he would keep insured the buildings erected, and to be erected, against loss or damage by fire to the full amount secured by the mortgage, and in default of such insurance defendants might effect the same, and the premiums paid or charged therefor should be a charge on the premises assigned by the mortgage. The plaintiff, thereupon, effected the insurance already referred to, making the total amount insured $22,500. He also assigned the different policies to the defendants as additional security for the sums he had borrowed, and they accepted those assignments as a satisfaction of his covenant to insure.

Judgment.

In March, 1872, the defendants admitted a loss under policy No. 33,191, of $531.91, and they *paid* that sum ; they also, as the bill states, admitted a loss under policy No. 39,295 of $2,000, and offered to pay that amount,

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but the defendants deny this, referring to the offer of $8,000, and as it was not accepted to their election to reinstate the buildings. The Lancashire Insurance Co. admitted a liability in consequence of the fire in February, 1872, of $212.27, the policy having been assigned by the plaintiff to the defendants. The defendants admit they received that sum, but not until the 2nd day of August, and after the second fire.

In the latter part of April or early in May, and while the defendants held money due by them on account of the fire in February, and might have received (as in fact they admit they did afterwards receive) the aforesaid sum of $212.27, the defendants sent to the plaintiff from their head office in Toronto, a receipt as follows : " $125. Renewal receipt. Western Assurance Company Home Office, Toronto, 6th April, 1872, No, 16,700. Received from *Moses Staunton*, Esq., of Toronto, the sum of $125 premium on $, assured by the Western Assurance Company, under policy No. 33,191, which is hereby continued in force for one year from the 6th of April, 1872, to the 6th of April, 1873. *F. Lovelace*, secretary, p. *T. R. Kenny :* Assigned to Western Assurance Co." The defendants' clerk gave evidence that Mr. *Haldan* (the managing director of defendants) told him not to renew through Mr. *Arthur Jarvis* who had acted as plaintiff's insurance broker, but if plaintiff would pay two and a half per cent. net he would renew this policy. *Kenny* told *Jarvis* of this, and on that or the next day he filled out the renewal receipt, and went with it to *Staunton's* warehouse, and saw *Baxter*, the plaintiff's book-keeper, and told him this was a receipt for an insurance which was due on 6th April. *Kenny* thought this was on 13th April. *Baxter* wished him to leave the receipt, and said if it was to be renewed he would send a cheque or the money. *Kenny* told *Baxter* the amount, and that was a receipt for it. *Kenny* left the receipt, and did not send for the

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money afterwards; he "overlooked" it, "it was just an oversight." He also said it was part of his business to see to the renewals of city policies; he was sure he did not refuse the money from Baxter. He had no instructions to renew the policy without getting the money. It was owing to the conversation with Mr. *Haldan* that he went to *Staunton* with the receipt.

Baxter's account of this matter is: that he received this receipt from *Kenny*, and, as he thought, on the 9th or 10th May, a few days before the (second) fire, which was the 12th May: that seeing what it was *Baxter* asked "Do you want the money for this," and *Kenny* replied, "That's all right, Mr. *Staunton* understands it." *Baxter* said, that if *Kenny* had wanted the money he would have gone and seen Mr. *Staunton*; as it was, he placed the receipt on a file on a desk, on which he put papers which he could not attend to himself without reference to Mr. *Staunton*.

Judgment.

Mr. *Jarvis* stated that he, as broker for the plaintiff, effected policy No. 33,191, in 1870, and renewed it in 1871. In April, 1872, plaintiff's son *Albert* instructed him to renew it. He saw *Kenny*, who told him the rate was raised, "It is two and a half now," and the witness said "All right, we will give it you," and *Kenny* remarked "I can't renew it with you." Mr. *Jarvis* shortly after met Mr. *Haldan*, and told him he had been about the renewal of that policy of *Staunton's*, and he said "*Staunton* owes us money, and it will have to come direct, I can't deal with you in it;" and the inspector, Mr. *Blight*, on the following morning said, he was sorry he could not allow *Jarvis* commission on it (the renewal) that year, but he would make it up to him another way. Mr. *Haldan* had previously said to witness that, of course, the Company would keep the policy up for their own benefit. Mr. *Jarvis* told this on the following day to *Albert Staunton*, who had full charge of the plaintiff's business as to insurance.

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There was a good deal more evidence given bearing more or less directly on the question of the renewal of this policy, and the witnesses differ as to many of the details, especially as to what was said by the different parties in the various conversations that took place.

I do not think that either party contemplated that the policy would be allowed to expire. Mr. *Blight,* their inspector, gives evidence that a few days after the fire in February, he told the plaintiff that the rate was too low, and that it would be raised to two and a half per cent. and that plaintiff replied he would not pay it. But the policy had then close upon two months to run. Now, Mr. *Blight* is "perfectly sure" that a conversation spoken of by Mr. *Jarvis* in his evidence about Mr. *Jarvis's* commission never took place, because that matter "was out of his jurisdiction." It is not, therefore, probable that he would speak to the plaintiff about increasing the premium unless the subject had been talked over between him and Mr. *Haldan,* the managing director; and so the renewal of the policy was in their contemplation, and approved upon condition. Again, Mr. *Haldan* remembers giving instructions to Mr. *Kenny* not to renew without the increased premium. Mr. *Kenny* mentions this to Mr. *Jarvis,* who had gone as plaintiff's broker expressly to renew the policy, and who at once assented to the increased premium. Mr. *Jarvis* swears this was on the 6th April, or the day after. The only new matter referred to on that occasion was that the business must be arranged without the intervention of a broker, it must "come direct." *Kenny* says that the same day, or the day after *Haldan* told him this, he filled up the renewal receipt and left it with *Baxter.* He thought this was on the 13th April, and he said this was the only instance in which he had ever left a receipt without getting the money; that he ought to have sent for the receipt or the money; but he represents that he told *Baxter* it was a receipt for $125, which he meant

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as a request, and that *Baxter* said that when Mr. *Staunton* came in he would send the money or a cheque. On the other hand *Baxter* swears *Kenny* left the receipt, two or three days before the second fire, which was on the 12th May, an event very likely to fix itself on *Baxter's* memory (coupled with the fact that the receipt was saved) and to remind him when he had got it. I think *Baxter's* account is the most reliable, and then the delay for so long in making any inquiry tends to the conclusion that Mr. *Haldan* considered it settled as he desired; while the plaintiff, who left the insurance business to his son's management, would suppose the renewal had been arranged satisfactorily, as he most probably had been told by *Baxter* that he had the receipt.

Judgment.

But after all, I must say that the evidence to support the plaintiff's case is neither strong nor clear, and in coming to a conclusion I have fully shared in the doubts expressed by the learned Chancellor in giving judgment on the rehearing. The concurrent opinion of the three Judges in the Court of Chancery has great weight with me in bringing my mind to a conclusion. I ought, however, to say I have not rested on the ground of estoppel, but I think the plaintiff has proved a *primâ facie* case, which the defence has failed to displace. I think the appeal should be dismissed, and it must be with costs.

STRONG, J.—The decree, under appeal, was made by me, when a Judge of the Court of Chancery, and I then, in a considered judgment, recorded the reasons for my decision, to which I still adhere. I think the appeal should be dismissed with costs.

BURTON, J.—There is a conflict in the evidence given by *Kenny* and *Baxter*, but the learned Judge before whom the case was heard was much better able to decide what weight should be given to their testimony than

those who merely read the language in which such testimony was given, and has reported that he adopted that of *Baxter* in preference to the other, both because he preferred the witness, and because it was more probable.

The policy in question was upon goods, and unless renewed would have expired on the 6th April, 1872. About that time Mr. *Jarvis,* an insurance broker, through whom the policy had been originally effected, and by whose agency the first renewal was also effected, by instructions of Mr. *Albert Staunton,* went to defendants' office in order to renew it, and was then told that the rate would be increased from one and a half to two and a half per cent, to which he, on behalf of the plaintiff, agreed, but the renewal was not then effected, inasmuch as the defendants objected to paying a broker's commission, for the reason that the plaintiff, as the defendants conceived, was under obligation to keep the policy on foot.

Judgment.

On the evening of the same day, Mr. *Jarvis* met Mr. *Haldan,* the managing director of the defendants, and referred to the fact of his having been at the office to renew the policy, and the manager repeated the intimation previously given to him at the office that it could not come through him, but direct; for the purpose manifestly of securing the benefit of the full premium without deduction for brokerage. There is some discrepancy, probably not very material, between Mr. *Jarvis's* evidence and that of Mr. *Haldan* as to what further occurred; the one stating as a reason for his declining to deal with him, that *Staunton* was owing them money, and that they would, of course, keep the policy alive for their own benefit; Mr. *Haldan* as positively denying this, and adding that if such had been their intention they would have renewed it on the day it became due.

There is an apparent discrepancy in the evidence of *Jarvis* and *Albert Staunton* as to *Jarvis* being at the

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plaintiff's between the time of his going to the company's office in the morning and the interview with Mr. *Haldan*, but both are agreed that on the following morning *Jarvis* told *Albert Staunton* of the conversation with Mr. *Haldan*, and then, at all events, communicated to him that the rate was to be increased, and that Mr. *Haldan* intended to continue it, and he then altered the figures in the memorandum book, containing the particulars of the policies, by changing the premium from $75 to $125, and substituting 73 for 72.

In point of fact the covenant to keep up the policies applied *to policies on the buildings*, and was limited to the amount of $20,000, whereas the policies then in force on the buildings amounted to $17,500; so that under no circumstances had the defendants the right to insist on the renewal of this policy, certainly not to the full amount, but it may be assumed, I think, from the evidence that both parties imagined that they had the right, and acted upon that assumption.

Judgment.

We have then the fact that *Jarvis*, having full authority to renew at such rate as he deemed proper, called upon the defendants for the purpose; that he assented to the rate demanded, and would have completed the arrangement but for the circumstance, that being a loan transaction, the company objected to paying a commission; that there is evidence that the managing director intimated that they intended to keep the policy alive, at the increased rate, for their own benefit; that this was communicated to *Albert Staunton* and assented to by him. It is true that this assent was never subsequently communicated to the company, and it is, I think, clear that had the matter rested there, there was no completed contract; and here the making out and delivery of the receipt becomes important.

Mr. *Jarvis* had previously, acting under his general

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authority, informed the company of the willingness of his principal to pay the increased rate, both at the office and in his interview with the managing director. The want of that assent may have been the cause of its not being renewed on the day, as Mr. *Haldan* says it would have been had the company intended to keep it up for their own benefit, and it is quite consistent with this state of things that directions should then have been given to complete it, and the receipt prepared and forwarded accordingly. But it is said that the delivery of the receipt by *Kenny* without the money was an unauthorized act, and, in fact, contrary to the express instructions he had received, but the evidence does not necessarily bear that interpretation ; he does not say : "I was instructed *not* to renew the policy without getting the money," but " I had no instructions to renew without getting the money." In fact the rate at which the policy was to be renewed, and not the payment in cash, would appear to have been the condition insisted on. Mr. *Haldan* says " I recollect giving Mr. *Kenny* instructions *not* to renew *unless two and a half per cent. was paid.* Mr. *Kenny* had no instructions to renew unless he received the money," No instructions, I presume, were necessary, but here, as well as in the case of *Kenny*, the evidence does not shew that he was instructed *not to renew* unless the money was paid. The impression left upon my mind, after a perusal of the evidence, is, that the actual payment in cash was not thought of; there were large transactions between the parties, considerable sums of money in the company's hands and others to which they were entitled under the securities they held, and it would not be strange, under such circumnstances, that it should be treated as a matter of account, and the receipt left without the money being demanded or expected.

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No doubt there are other circumstances to be taken into consideration, which militate against this view.

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The entry on the counterfoil "Not paid :—carried to memo. of unpaid premiums," is inconsistent with the view that the company intended to charge it in account. I can find no reference to this, nor any explanation of it in the evidence, nor does it appear at what time it was made. It may be that the rate being unadjusted may have been the cause of it; it being carried to a memorandum of that kind at all, would rather indicate that the company had not abandoned the idea of its still being renewed, or at all events is not inconsistent with that view. *Albert Staunton* had no knowledge of there being money in the hands of the company, and he had no reason to believe that the policy would be renewed without payment, whilst the plaintiff, who knew that the company had funds, does not appear to have been aware of the negotiations for renewal, or that the receipt had been left; and, according to Mr. *Blight's* testimony had intimated that he would not consent to pay the increased rate.

Judgment.

These were all matters for the consideration of the learned Judge who heard the case, and, no doubt, were all deliberately weighed before pronouncing the decree made at the hearing. That decree has been reconsidered by the full Court, and the result arrived at by the learned Judge met with the entire concurrence of two of his learned brothers, * and, with some doubts caused by the conflicting and contradictory nature of the evidence, with that of the Chancellor. We are now called upon to review a finding under these circumstances.

The question would seem to resolve itself into this: Can this Court take upon itself to reverse a judgment on the ground that it is not warranted by the evidence; and if we have jurisdiction to do so in any case, then, whether the decision is so manifestly erroneous that

* Blake and Proudfoot, V.CC.

within the settled rules governing the exercise of such a power we should do so here ?

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The evidence in many respects, not only in those matters to which I have specially referred, was conflicting and contradictory, but we cannot say there was no evidence tending to the conclusion at which the learned Judge arrived; but even although we might conclude that sitting as the presiding Judge we should not have come to the same decision, that would not be sufficient in my judgment for our interference. If no rule of law or principle of equity has been violated to the prejudice of the appellants, I find no warrant for invoking the jurisdiction of this Court; and being of opinion that that is not the case here, I think the appeal should be dismissed.

PATTERSON, J.—I think this judgment should be affirmed, on the ground that there is quite sufficient evidence to warrant the finding that the policy in question was renewed by the defendants, and was in force at the time of the fire on 12th May, 1872.

Judgment.

I have not arrived at this conclusion without some hesitation. If the finding had been against the plaintiff, I do not think he would have had much reason to complain. It is very evident that there was a great want of attention to the important business of keeping up the policy on the part of those managing the plaintiff's business; and the renewal, which is now found, as a matter of fact, in the plaintiff's favour, was due to what was done on the part of the defendants, rather than to care and vigilance on the plaintiff's part.

Having regard to the credit given to the witnesses by the learned Judge before whom they were examined, as well as to the letter of the depositions, the facts which appear to me to be material, are as follows:

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The policy expired on the 6th April. On that day or the following day Mr. *Jarvis* was told to renew the policy, and went to the defendants' office where he saw Mr. *Kenny*, the clerk whose duty it was to attend to the renewal of city policies. He was informed by Mr. *Kenny* that the rate was to be increased from 1½ to 2½ per cent., and he stated to Mr. *Kenny* that that rate would be assented to. Mr. *Jarvis* was at that time informed by Mr. *Kenny*, as he was afterwards informed by Mr. *Blight* and by Mr. *Haldan*, that the defendants would not renew the policy through him, but would only renew it direct; this statement did not imply any unwillingness to deal with Mr. *Jarvis*, or to communicate with the plaintiff through him; but only that having other money dealings with the plaintiff, they preferred to transact this particular business without the intervention of a broker to whom they would have to pay a commission. It pointed merely to the saving of Mr. *Jarvis's* commission.

Judgment.

On the same afternoon Mr. *Jarvis* informed Mr. *Albert Staunton*, who managed the plaintiff's business, that the rate was to be 2½ per cent., and Mr. *Staunton* assented to the increase. I may here remark that the learned Chancellor, who did not fully agree with the learned Vice Chancellors in the judgment now in appeal, seems to have owed his hesitation in part to the circumstance that, although Mr. *A. Staunton* assented to the increased rate when Mr. *Jarvis* mentioned it to him, that assent did not appear to have been afterwards communicated to the defendants. I do not find any difficulty in that quarter, because the evidence is that Mr. *Jarvis* had a general authority to arrange the rate of insurance for the plaintiff; this must have been known to defendants; he had in the morning intimated to the defendants that the proposed rate would be agreed to. And the subsequent ratification of this by Mr. *Staunton*, did not make it necessary to repeat the intimation to the

defendants, who had no reason to suppose that any ratification was required.

Later in the same evening Mr. *Jarvis*, speaking of this policy to Mr. *Haldan*, the managing director of the defendants, was told by Mr. *Haldan* that the defendants would not renew through him, but that they would keep the policy up for their own sakes—alluding to the fact that the policy had been assigned to the defendants as collateral security for money which the plaintiff had borrowed from them. On the following morning Mr. *Jarvis* communicated this conversation to Mr. *A. Staunton*.

I do not here place any stress on the fact that at the last mentioned conversation between Mr. *Jarvis* and Mr. *Staunton*, the latter adjusted the entry in his book, making it a memorandum of the policy as in force till the 6th of April, 1873, at the increased rate. I do not consider that any estoppel arose by reason of what took place then, or at any time, and I think that if the matter had remained as it was immediately after the interview, there would have been no pretence for saying that the policy was renewed, or that the defendants were estopped from denying that it was renewed.

Judgment.

The matter, however, did not rest there. Some days after, the defendants sent a renewal receipt to the office of the plaintiff, and left it there. There is a considerable discrepancy in the evidence as to when this receipt was sent. The date given by Mr. *Kenny*, who took it there, is the 13th of April. That is the date found by the learned Judge who heard the cause, and the defendants can scarcely complain if the account given by themselves is the one adopted. Mr. *Baxter*, the plaintiff's bookkeeper, with whom the receipt was left, but who knew nothing of the insurance matter and

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had no charge of that part of the business, says he mentioned to the plaintiff that the receipt had been sent. Possibly the fact that, with the plaintiff's knowledge, the receipt was allowed to lie for a month in his office, might have been of some weight in the plaintiff's favour. But we cannot so treat it, because the plaintiff himself, in his deposition before a special examiner, says, that he did not know until after the fire that this policy had required to be renewed. It is evident, therefore, that whatever Mr. *Baxter* may have said to him when the receipt came, he failed to attract his intention to this particular policy.

I do not attach very much importance to the circumstance that up to and until after the 13th April, the defendants had in their hands a large sum of money to which the plaintiff was entitled in respect of the fire of the previous February, and which at that time they had not decided to apply in rebuilding, or to the fact that

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they were entitled to receive the sum of $212 from the Lancashire Company. The importance of those facts as direct evidence would depend on its appearing that the defendants had applied, or intended to apply, part of the moneys in paying the premium. Yet they are not without some weight, as the circumstance of funds being under their control, out of which the premiums might, if necessary, be paid, supports the inference that there was no very strong reason why the defendants should have insisted on cash being paid down before they renewed the policy.

The *primâ facie* case, then, upon which in my judgment the finding in favour of the plaintiff can properly rest, is that made by the facts which may be again shortly stated as follows :—

The defendants were interested, as well as the plaintiff in keeping up the policy. Both parties, plaintiff and

defendants, intended that the policy should be renewed. The plaintiff had expressly intimated to the defendants that he wished the policy renewed ; and the defendants had been informed by the plaintiff's agent that the plaintiff would agree to the premium demanded. The defendants had intimated that they would keep up the policy for their own sake, which intimation was made by their managing director, and though not a formal communication to the plaintiff, must have been intended by him to reach the plaintiff, or, at least, he must have thought it probable that it would reach him. In fact, it was communicated to the plaintiff, and the defendants afterwards issued to the plaintiff the receipt, which is the ordinary evidence of renewal.

These facts given in evidence, and not rebutted or explained, would clearly justify the inference that the defendants had renewed the policy, not insisting on payment in cash, but looking to the plaintiff to pay the premium either on the settlement of their accounts, or at some other time.

Judgment.

Let us see how far it can be insisted by the defendants that they have successfully rebutted or explained away the *primâ facie* case—bearing always in mind that the defendants cannot claim from us any greater credit to their evidence than was accorded to it by the Judge at the hearing.

There is first the evidence of Mr. *Albert Staunton*, that he did not know that the defendants held any money for the plaintiff, and that he expected that the premium would have to be paid in cash. I do not understand this statement as implying that he thought the cash would have to be paid before the policy was renewed. He had already sworn that he considered the policy in force from the time when Mr. *Jarvis* told him of his conversation with Mr. *Haldan*. I understand merely that he

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was not aware of any funds out of which the defendants could pay themselves, and, therefore, expected that when the premium was paid the money would have to be provided for it. Either view of the evidence, however, leaves untouched the theory that the defendants chose to renew on credit. Then there is evidence that the defendants did not, in fact, charge the premium to the plaintiff in their books. This is rather evidence that they did not, in fact, renew the policy under any distinctly formed intention to act under the rights which they had or may have assumed they had, as assignees of the policy; but it is scarcely evidence, or at best is only very slight evidence, that they were not willing to wait for the premium. I apprehend that it is quite competent for an insurance company to give credit, and that if they issue the ordinary voucher, acknowledging payment and stating that an insurance has been effected or continued—not, in fact, receiving the money, but choosing to give credit for it—a contract is made; and that this will be so whether the premium is charged in a ledger account, to be paid or accounted for at some periodical settling day, or whether the credit is for a short or indefinite time, as until called for or until convenient to send it. The facts would support a count charging that the defendants at plaintiff's request had renewed the policy o nthe terms that the plaintiff was to pay $125 for the renewal. A promise, express or implied, to pay the premium would, in law, support the contract as well as the actual payment.

Judgment.

There is further the evidence of Mr. *Haldan* and Mr. *Kenny*, which is relied on to shew that the receipt was not sent as a voucher, but only in a tentative manner, to be retained and to be operative if the plaintiff sent the $125 to pay the premium, or to be returned if he decided not to renew at the increased rate. On this point Mr. *Haldan* says "I recollect giving Mr. *Kenny* instructions not to renew unless two and a half per cent. was paid.

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Mr. *Kenny* had no instructions to renew it unless he received the money. Of course, I expected the money to be paid * * Mr. *Kenny* was not authorized to say that Mr. *Staunton* would not be expected to pay the premium, or anything of that kind ;" and on cross-examination " I recollect *Kenny* telling me that the policy had not been renewed. It was *Kenny's* duty to look after this premium, as it was a large premium. I can't say if it was the course of the office to send out clerks to collect premiums." Mr. *Kenny* in his evidence says "Mr. *Haldan* told me not to renew through *Jarvis*, but if *Staunton* would pay two and a half per cent. net he would renew it. I think Mr. *Jarvis* was in the office about this time, and I told him of it. Either the same day, or the next day after Mr. *Haldan* had told me this, I filled out the renewal receipt and went with it to Mr. *Staunton's* warehouse, and saw Mr. *Baxter*. I told Mr. *Baxter* that this was a receipt for an insurance which was due on the 6th April. This must have been, I think, on the 13th of April. * * Mr. *Baxter* said to the effect that Mr. *Staunton* was not in, and that he (*Baxter*) did not know anything about it, and wanted me to leave it, and said if it was to be renewed he would send a cheque or the money. I told *Baxter* what the amount of the premium was, and that that was a receipt for it." On cross-examination he says that his not sending for the receipt or the money was an oversight. Mr. *Baxter* says of the receipt " I received it from Mr. *Kenny*, a clerk in the Western Assurance Company's office. He brought it to the office. I think it was on the 9th or 10th of May. It was a few days before the fire, which was on the 12th of May. Mr. *Kenny* when he came in put the receipt down on my desk. I looked at it, saw what it was, and said ' Do you want the money for this ?' He said ' that's all right, Mr. *Staunton* will understand about it.' Nothing more passed, and Mr. *Kenny* left, leaving the receipt with me."

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The learned Judge who heard the evidence held that the date given by *Kenny* was the correct date, but that in other respects the account of the interview which *Baxter* gave was the true statement of what took place. I do not treat this evidence as of importance in any way except as touching the question I am now discussing viz., whether a fair view of any evidence given respecting the receipt makes it our duty to say that it is displaced from its position in the *primâ facie* case which I have stated.

In my opinion there is nothing in the evidence—taking, as I do take, *Baxter's* account of the interview to be correct—from which we can say a Judge or a jury ought to find that *Kenny* was instructed not to give the receipt unless the money was paid down, or that his instructions amounted to anything more than "Don't renew through Mr. *Jarvis*, and don't renew under two and a half per cent;" leaving the question of cash or credit to follow the ordinary mode of doing business in that office, as to which, of course, Mr. *Kenny* required no special instructions.

Judgment.

If the renewal had been effected through Mr. *Jarvis*, I gather from the evidence that the course of proceeding would have been to hand him the receipt and debit him with the premium, but not to have received actual payment until the next periodical settling day between the defendants and Mr. *Jarvis*.

The avowed object of "renewing direct" being merely to save the commission, there is nothing improbable in the assumption that the receipt was handed to the plaintiff in place of being handed to Mr. *Jarvis* for him, the actual payment of cash at the time being no more regarded in the one case than it would have been in the other.

On the whole I cannot say that the *primâ facie* case is got rid of. 1876.

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The matter may be stated in another way. *Primâ facie* the production of the policy and the renewal receipt proved the plaintiff's case, and would equally have proved it in an action at law. To this the defendants answer, that the premium was not really paid; that the receipt was not delivered to operate as a receipt, unless and until the money was paid; and that by condition No. III. of the policy, "No assurance, whether original or continued, will be considered binding until the actual payment of the premiums."

We are asked by the appellants to say that, upon the evidence given, the Court below ought to have held that the *primâ facie* case was answered. I do not think that any view of the evidence makes it our duty to do so. It is true that no money was paid by plaintiff to the defendants for the purpose of paying this premium, and the receipt is not conclusive evidence either at law or in equity of the fact of payment; but having regard to the interest which the defendants had in keeping up the policy, and to the fact that the renewal might properly be made by them as well as by the plaintiff, and to the views of the evidence which I have already expressed, I cannot say that, apart from the condition, the finding is not fully sustained. Judgment.

The condition is not very intelligible as touching *original* assurances; it cannot operate on the policy to which it is annexed, and in which there is an acknowledgment by deed that the premium is paid; and it certainly cannot control original assurances which are not under this policy. Then what is meant by *continued assurances* not being binding till the premium is paid? There is no provision for continuing the assurance contained in the policy, or anywhere, but in the condition

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No. XI., which begins by providing that "An assurance may be continued for such time as may be agreed on," that is to say, the parties may contract to continue the assurance. An express condition was scarcely necessary for this; and apparently the condition is inserted, not by way of permitting what required no permission, but in order to provide, as it goes on to do, that the new contract shall be subject to certain things, which, without that provision, might only apply to the original one.

As the renewal or continuance of the assurance is therefore a matter not of right under any terms of the policy, but to be effected by a fresh contract, are we to read condition No. III. as limiting the power of the company to make what contract they please, or as enabling them to repudiate a contract to renew, giving credit for the premium, by pointing to this reference to actual payment? I have no idea that the condition can be so construed. The condition would be appropriate to a policy containing a provision similar to that found in life policies, which gives the assured a right to renew from year to year. In that case it would be a proper as well as a prudent stipulation regulating the way in which the right should be exercised.

Judgment.

As it stands in this policy I am unable to see that it has any effect.

Again, assuming that the condition did in some way apply to prevent the assured from claiming that the policy was renewed without his having actually paid the premium, it could have no application if the defendants themselves renewed the policy for the purpose of maintaining their security, in which case the payment becomes a mere matter of book-keeping.

For these reasons, amongst others, I am of opinion that the condition in question does not affect the present

contest, and that the transaction which has throughout been called a renewal of the policy, and which is not improperly so called, was not a continuance of the assurance in any sense to which this condition can apply, but was a new contract. 1876. Staunton v. Western Assurance Co.

I have examined and discussed the evidence, not entirely as might perhaps have been done if it had been my province to decide the facts as a member of a Court of first instance, but as having to decide whether the Court of Chancery was wrong in affirming the decree made at the hearing. I cannot say that the decree ought not to have been affirmed; on the contrary, I am satisfied that not only does the evidence warrant the decision, but that substantial justice has been done. The defendants have not been led into any position which they did not intend to occupy, or fixed with the liability of a contract which they did not intend to make. There has been no question of misunderstanding or deception. The defendants not only did intend but were evidently anxious to renew the policy; and though, in my view of the case, the fact of money being in their hands or subject to their order is unimportant as direct evidence on the question of the contract, it is useful as shewing that if the cash was not paid for the premium, they, nevertheless, were neither running any risk of losing that money, nor were they deprived of the use of any money which under all the circumstances they would have been entitled to; and that, therefore, in respect of the premium itself, which has furnished the whole ground of the dispute, no injustice has been done by the decree. Judgment.

I agree that the appeal should be dismissed, with costs.

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THE TRUSTEES OF THE FRANKLIN CHURCH v. MAGUIRE.

Bill by trustees of church—Corporate character—Pleading—Demurrer—Parties.

Where a bill was filed in the name of "The Trustees of the Franklin Congregation of the Methodist Church of Canada" against persons claiming under a deed from their grantor, for the purpose of setting aside such deed as a cloud upon the title of the plaintiffs: *Held*, that the suit was properly instituted by the trustees as such; and that neither their grantor nor *The Attorney-General* was a necessary party thereto: and, *Semble*, that the effect of the Statute was to constitute the trustees a corporation; but at all events they had a right to sue in their collective name in the same manner as a corporate body would sue.

Statement.

The bill in this case was filed by *The Trustees of the Franklin Congregation of the Methodist Church of Canada* against *William Maguire*, *William Follis*, and *Wesley Jones*, and stated that the plaintiffs were a corporation duly incorporated under the Statute of Ontario, 36 Vic., ch. 135.

That in the year 1864, certain members of a body of Christians, then known as "The Methodist New Connexion Church of Canada," with the consent and permission of *James Follis*, the owner, erected a church on a certain piece of land in the township of Manvers (particularly describing it) at a large expense, to be used by the members of that church as a place of worship, upon the faith of the representation and promise of *James Follis* that he would permit and allow them at all times to use the said building as a place of worship. That *James Follis*, on the 9th of December, 1870, conveyed the lands to *John George Follis*, by a deed which was registered on the 27th of December, 1872. That on the 1st of September, 1875, *John George Follis*, for a valuable consideration, granted and conveyed the said lands and premises in fee simple to the plaintiffs and their successors forever, to have and to hold the said parcel or tract of land and premises unto

and to the use of the said plaintiffs and their successors upon the trusts mentioned and set out in the second column of the second schedule to the Act passed by the Legislature of Ontario, 35 Vic., ch. 107, which deed was duly registered on the 6th of September, 1875. That the plaintiffs were under that deed seized in fee simple of the said land and entitled to the possession thereof, That by an Act of the Province of Ontario, 38 Vic., ch. 78, all the property held in trust for the Methodist New Connexion Church of Canada was declared to have become vested in trust for The Methodist Church of Canada; and the plaintiffs were thereunder entitled to the said land. That by a deed of the 8th of July, 1875, *James Follis* purported to grant and convey to the defendants in fee simple the said lands. The defendants caused that deed to be registered on the 12th of July, 1875, and the same formed a cloud on the title of the plaintiffs. That the defendants had gone into possession of the church, and refused to permit the plaintiffs to use the same for the purpose of worship, and wrongfully excluded the plaintiffs from possession, and that the defendants threatened to remove the church.

Statement.

The plaintiffs prayed an injunction to prevent the removal of the church; that the registration of the deed of the 8th of July might be annulled and cancelled, or that the defendants might be ordered to deliver up the deed to be cancelled, and that the defendants might be ordered to deliver up possession of the lands to the plaintiffs.

The defendants demurred for want of equity and for want of parties, alleging that the Attorney General, The Methodist Church of Canada, and *James Follis*, should be parties.

Mr. *Armour*, Q. C., for the demurrer, contended that the plaintiffs were not duly incorporated and could not, therefore, maintain this suit; that the plaintiffs were

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not a corporation under the Act. He also contended that *James Follis* was a necessary party to the suit, as also the Attorney-General of Ontario. By the deed the trustees are to hold the lands in trust for the Church in Canada, but this he submitted would not authorize the trustees suing as a corporation.

Mr. *Bethune*, contra, contended that the deed being expressed to be to the parties named and their successors for ever, and the Act under which they claim to be entitled having declared that by the name expressed in the deed they shall take, hold, and possess the land, constitutes them a *quasi* corporation. He also contended that in no view of the case could either *James Follis* or *The Attorney-General* be looked upon as a necessary party. As to the former he did not retain and was not now entitled to any interest in the land which could possibly be enlarged by the avoidance of the deed to the plaintiffs ; and as to *The Attorney-General*, his protection was not required in the interest of either party, and the question was one simply between the parties themselves.

Argument.

Mr. *Armour*, Q. C., in reply, submitted that the word "successors" in the Act meant only the successors to the trustees, and could not by any rule of construction be taken to mean the successors to the corporation ; and the corporation could have no successors except by virtue of the statute.

The *King* v. *Sherrington* (*a*), *Humphreys* v. *Hunter* (*b*), *Berkeley Street Church* v. *Stevens* (*c*), were referred to.

Proudfoot, V. C.—On the argument of the demurrer nothing was said as to The Methodist Church being a

(*a*) 1 *Leach's* Cr. Ca. 513. (*b*) 20 U. C. C. P. 456.
(*c*) 37 U. C. R. 9.

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necessary party, and I assume that ground of demurrer was abandoned.

On the ground of want of equity it was argued that the plaintiffs are not a corporation, and, therefore, that the deed to them passed no estate.

The 36 Vic., ch. 135, does not in so many words term them a corporation, but it confers upon them a number of corporate powers. It provides that any religious society desiring to take a conveyance of land for the site of a church, &c., may appoint trustees, to whom, and their successors to be appointed in such manner as may be specified in the deed of conveyance, the land requisite for the purpose may be conveyed ; and such trustees and their successors in perpetual succession *by the name expressed in the deed*, may *take*, *hold*, and possess the land, and maintain and defend actions in law or equity for the protection thereof, and of their property therein.

Judgment.

Other clauses in the statute give them power to mortgage the land to secure debts incurred for building the church, and to lease, and in their own names, *or by any name by which they hold the land*, to sue or distrain for rent in arrear.

These powers to hold land in perpetual succession, to sue and to be sued, and to distrain for rent in a corporate or collective name, are attributes of a corporation, and comprise all that is essential to its existence. The creation of the artificial person, with legal immortality, by which a perpetual succession of many persons are considered as the same, and who may act as a single individual, are the most important properties of a corporation: *Dartmouth College* v. *Woodward* (*a*). Without an express grant it is incident to every corporation

(*a*) 4 Wheat. 636.

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to adopt and use a corporate seal (*a*). It is not necessary that they should have been created a corporation by express words: *Conservators of the River Tone* v. *Ash* (*b*). Their powers are confined to the land held in trust for the religious association. Had they been termed a corporation, then the Interpretation Act, C. S. C. ch 5., sec. 6, sub-sec. 24, would have ascribed to them power to hold personal property and movables, which the Legislature probably did not intend to confer upon them, and a right to alienate land at pleasure, while the power to aleniate intended to be given to these trustees is of a modified character.

Judgment.

It does not seem to me to be necessary, however, to determine that the plaintiffs are a corporation; for upon the construction of the statute, call them what you will, I think they have authority to take and hold land in their collective name. The society is to appoint the trustees, who *by the name expressed in the deed* may take and hold the land conveyed. It does not seem necessary that the individual names of the trustees should appear in the deed. This may also be inferred from the power to distrain, which may be exercised in the individual names of the trustees, *or by any name by which they hold the land.*

In *Humphreys* v. *Hunter* (*c*), *Gwynne*, J., delivered the opinion of the Court, that the trustees, for the time being, might bring ejectment in their own names, with the addition of trustees, &c., or they might sue in their *quasi corporate* name alone without their individual name. So in *The Trustees of the Ainleyville Congregation, &c.* v. *Grewer* (*d*), *Hagarty*, C. J., says "I think we may hold in this case that the plaintiffs herein hold this land under the deed from *Holliday* as a corporation,

(*a*) 1 Dillon on Mun. Corp., sec. 130. (*b*) 10 B. & C. 349.
(*c*) 20 U. C. C. P. 456. (*d*) 23U. C. C. P. 533.

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or, at least, in a corporate or collective name, as described in that deed, and that the statutes recognize their right to act by and use such name. And in *Berkeley Street Church* v. *Stevens* (*a*), it was held that the plaintiffs might sue in their *quasi corporate* name as trustees without naming any as such. The right to sue, and the right to hold, are by the statute in the same persons ; and if the trustees may sue in the collective name, so also may they take and hold in that name.

The statute sanctioning the Wesleyan Methodist model deed, 35 Vic., ch. 107, was referred to, and the form of the deed in the schedule, which seems to contemplate the trustees being named individually, as well as in a collective name, as grantees. I do not doubt that a deed so framed would be operative ; but it si not necessary to adopt this precise form, for section 3 applies the Act not only to deeds in that form, but to "any other such deed expressed to be made in pursuance of the Act or referring thereto ;" and the 4th section provides that if a deed fail to take effect under the Act it shall be effectual to bind the parties so far as the rules of law and equity will permit. So that if the deed be operative under the statute, 36 Vic., ch 135, it will suffice. And I have said above that in my opinion it was effectual under that Act.

Judgment.

If it had been necessary, to enable the plaintiffs to sue, that the deed should have been made to them in their individual names, I think the allegations in the bill sufficient upon a reasonable construction. It alleges that the conveyance was made to them and their successors to hold upon the trusts of the statute, 35 Vic., ch. 107 ; and it is doing no injustice to any rule of pleading to read this as a statement that the land was

(*a*) 37 U. C. R. 9.

1876. so conveyed as to entitle the plaintiffs to sue: *Foot* v. *Bessant* (*a*), *Grant* v. *Eddy* (*b*).

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I see no reason for requiring *James Follis* to be a party. It is said the conveyance to him was voluntary. I do not know how this is; it is not so stated in the bill; and even if it were voluntary it could not be avoided by a subsequent sale, as the deed to the son was made and registered long before the conveyance to the defendants. No relief is sought against *James Follis*, and the avoidance of the deed to the defendants would vest no estate in him: *Calvert* v. *Lindley* (*c*).

No case was cited to shew that the Attorney General was a necessary party, and no reason suggests itself why he should be before the Court. The plaintiffs and defendants are both insisting upon a legal title; and in charity cases, and those analogous to them, the Attorney General is not ordinarily required to be a party where the gift, the subject of the suit, was made to a corporate body, or to trustees named by the donor. The subject was discussed with much care and learning in the case of *Boulton* v. *The Church Society* (*a*), and governs the present.

Judgment.

The demurrer will, therefore, be overruled, with costs.

The defendant will have leave to answer within a fortnight.

(*a*) 3 Y. & C. 320, 325.
(*b*) 21 Gr. 568.
(*c*) 21 Gr. 470.
(*d*) 14 Gr. 123.

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ABELL v. MORRISON.

Lost notes, security against—Hearing pro confesso.

Where in a suit to enforce payment of promissory notes that had been lost, after maturity, the defendant allowed the bill to be taken *pro confesso*, and omitted to make any demand for security against the notes, the Court made a decree for payment without requiring the plaintiff to give such security.

This was a suit by *John Abell* against *Thomas Morrison* and *Charles Morrison*, the bill in which was filed 10th July, 1875, setting forth that in August, 1868, the defendant gave the plaintiff three several promissory notes payable respectively the 1st February, 1869-70-71, for the sum of $116.76 each, with interest at 7 per cent. ; that the same were long past due, but no part thereof had been paid, and the same were in the possession of the plaintiff until some time after they had become due, and had since been accidentally lost. That the defendants were entitled to some estate or interest in a certain unpatented lot of land (setting it forth), and threatened and intended to sell and dispose thereof for the purpose of fraudulently defeating and delaying the plaintiff in the recovery of his said claim ; and that the plaintiff was apprehensive they would, if permitted, so dispose of the same ; and the plaintiff would thereby lose his claim. The prayer was that the defendants might be ordered to pay said notes and interest and costs of suit—in default a sale by the Court. Statement.

The bill was taken *pro confesso* against both defendants, and the cause coming on for hearing :

Mr. *Attorney-General Mowat*, for the plaintiff, argued that according to the late cases the Court had jurisdiction even to set aside a fraudulent sale at the instance of any creditor, though he had not obtained judgment or execution; that the Court had jurisdiction also to restrain

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Abell v. Morrison.

a fraudulent sale at the instance of such a creditor; and that in view of these considerations and the provisions of the Administration of Justice Act, the plaintiff was entitled to a decree for payment of the money, and in default a sale of the property: referring to *Longeway* v. *Mitchell* (*a*), *Knox* v. *Travers* (*b*), *Sawyer* v. *Linton* (*c*).

THE CHANCELLOR made the decree as asked, and observed that security was usually required; but as the defendants admitted that the notes were not lost until over due, and did not appear to ask for security, he thought a decree for giving security against the notes might be dispensed with.

CLARKE v. COOK.

Administration—Distribution by consent.

J. S. C. died in the State of New York, leaving a will, which the Courts there declared void as having been improperly attested, and thereupon letters of administration of his effects in Ontario were granted to his widow, by the proper Court; and she and the next of kin—all of whom were of age—made an agreement for a distriubtion of all the assets, whereupon she filed a bill in this Court to have such agreement established and the intended will declared invalid, with a view of estopping the intended legatees thereunder from afterwards attempting to set up the same. The Court under the circumstances and in view that the intended legatees were not parties and that no controversy was shewn to exist, refused to make any declaration, and dismissed the bill; but—as the defendants were all assenting parties to the course pursued by the plaintiff—without costs.

The late Rev. *J. S. Clarke*, of Ashland, Greene Co., State of New York, left a will bequeathing pecuniary legacies to the amount of $34,300, and disposing of the residue of his "pecuniary resources." He owned land

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(*a*) 17 Gr. 190. (*b*) Ante 41. (*c*) Ante 43.

and possessed personalty in the United States, and personalty in Ontario. 1876.

Clarke v. Cook.

The executor named in the will applied for probate to the Surrogate Court of the Domicile in Greene County, and the heirs at law and next of kin of the Rev. *J. S. Clarke* were cited. Witnesses were examined, and the Court adjudged and decreed that the instrument in writing was not executed and attested in the manner prescribed by law for the execution and attestation of last wills and testaments, and that it was null and void. And administration was granted to *James F. Clarke* and *Erastus Cooke* of the personal estate in the State of New York.

Administration of the personalty in Ontario was granted to *Diana Clarke,* the widow of the intestate.

Statement.

The widow and the next of kin, all being *sui juris*, made an agreement for dividing the estate, by which the widow was to administer the assets in her possession in Ontario, and after payment of expenses and commission, to retain one-half of the residue and distribute the remaining half amongst the next of kin ; and she was to release all claim upon the assets of the estate within the United States in consideration of $1,000.

The widow filed this bill making the said *Erastus Cooke* and the next of kin defendants. In the 11th paragraph the plaintiff submitted that it was expedient and necessary that this Court should decide whether the said intended will of the deceased was or was not invalid, in order that intended legatees mentioned therein, several of whom resided within the jurisdiction of this Court, and very few of whom lived within the United States of America, might be estopped from hereafter seeking to set up the same. And in the 12th paragraph she sub-

1876. mitted that *Nepean Clarke*, one of the next of kin, who was named executor in the will, sufficiently represented the parties beneficially entitled under the said will.

Clarke v. Cook.

The bill prayed that the estate of *J. S. Clarke*, in Ontario, might be administered, and that the agreement for division might be carried out, and that it might be declared that the deceased died intestate; and that the plaintiff and her sureties might be relieved from all liability in respect of the administration bond.

Mr. *Rogers*, for the plaintiff.

Mr. *Cattanach*, for the defendants.

April 12th. PROUDFOOT, V. C.—[After stating the facts.] It has been repeatedly held in this Court that an administrator or executor has no right to come to this Court for the administration of an estate without shewing some

Judgment. necessity therefor. He assumes the duty of administration, which he is not entitled to call on this Court to discharge unless there be some impediment or difficulty in the way: *Cole* v. *Glover* (*a*), *White* v. *Cummins* (*b*). There is no difficulty in this case to call for the interposition of the Court.

Nor is it necessary for the purpose of enforcing the agreement for distribution. All parties are capable of making the agreement, and none of them refuses to carry it out. There are ample means under the statute 29 Vic., ch. 28, for the administratrix to protect herself from the claims of creditors and legatees, without going through the proceeding of an administration suit. And if all the parties interested make an agreement for distribution, the administratrix incurs no liability on her bond to the Surrogate.

(*a*) 16 Gr. 392. (*b*) 3 Gr. 602.

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So far as relief is sought on the ground stated in the 11th paragraph, for the purpose of estopping the legatees, several of whom are within the jurisdiction, I apprehend the record is not framed to effect that object. The legatees referred to are not parties to this suit, and will not be estopped by any decree that would be made. And I do not think the executor in the proposed will sufficiently represents them in this suit. If it is a matter for the discretion of the Court only whether trustees sufficiently represent the *cestuis que trust* or not, then this is not a case in which I would dispense with them. The executor is one of the residuary legatees it is true, but what the residue would amount to after paying legacies to the amount of $34,000 does not appear, and as he is one of the next of kin it might be very much more to his interest to set aside than to sustain the will: *Reed* v. *Prest* (*a*), *King* v. *Keating* (*b*).

Judgment.

The legatees were not cited before the Surrogate Court that declared the will void, and if they are not to be parties to this suit, the whole distribution of the estate, and that in a manner not contemplated by the testator, will have been made without notice to them of any kind.

I see no ground, therefore, on which the Court can be asked to make any decree or declaration; but, as the defendants seem to assent to the course of the plaintiff the bill will be dismissed without costs.

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1 K. & J. 183. 12 Gr. 29.

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SMITH v. SMITH. [IN APPEAL.] *

Will—Trustees—Discretion in investing.

A testator directed that until the period of distribution the rents and profits accruing from certain property devised to the children of his son should be given and applied by his executors towards the support and maintenance of the said children if his executors should think proper; and if not, to be by his said executors invested or otherwise disposed of by them to the best advantage for the said children, at the discretion of the said executors.

Held, that under this direction the executors were justified in applying the money to the purchase of a piece of land adjoining other land which went to the children, in order to the preservation of a mill site or privilege situate on the lands so going to the children; and also in building a house upon the lands devised, intended for the residence of the son and his children; and the fact that on a re-sale of the land, the same, owing to the great depreciation in the value of real estate, sold for about one-fifth of the sum paid by the executors for it, did not constitute the purchase a breach of trust, or render the executors liable to make good the loss.

The same testator gave power to his executors to sell and dispose of any of his land, and to invest the proceeds of such sale for the use and benefit of the said children, provided the said executors should consider it to be to the advantage of the children aforesaid to do so.

Held by the Court of Appeal, (1) that this fund also might properly be invested by the executors in buying the land and in the construction of the dwelling (SPRAGGE, C., *dissentiente*); and (2) that any question as to part of the purchase money which they had received being used in such building had been put an end to in consequence of such children, after they had come of age, having, as found by the Master, precluded themselves by their acts from charging the expenditure to have been a breach of trust (SPRAGGE, C., *dubitante*).

Statement. This suit was originally instituted by *Augusta Louisa Smith* and *John Shuter Smith*, the widow and one of the sons of the late *John David Smith*, who died in 1849—after having made his will dated September, 1846, whereby certain lands were devised to the plaintiffs and *Elias Peter Smith*, in trust for the several children of

* *Present*—DRAPER, C. J., RICHARDS, C. J., SPRAGGE, C., HAGARTY, C. J., MORRISON, J., GALT, J., STRONG, V. C.

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the testator ; but by a codicil made in November, 1847, he revoked the devise in favor of his son *David* and directed that the trustees should hold the share of *David* for the benefit of his several children—and prayed, amongst other things, an administration of the estate of the testator ; a partition or sale of the land and a distribution of the proceeds. The decree made in the cause directed a partition or sale of that portion of the estate devised for the benefit of the children of *David Smith*. In pursuance of this decree the Master at Cobourg took the necessary accounts, and made his report dated 11th March, 1872, whereby he found payable to the surviving trustee as money properly expended under the trust deed, and interest thereon, the sum of $2,657.45, over and above the amount received on account of the estate.

Statement.

From this report the defendants *William K.* and *Lawrence R. Smith* appealed, on the grounds : (1.) That the Master had improperly allowed the plaintiffs credit for $6,144 paid by them to one *H. H. Meredith*, on the 12th of December, 1856, for the purchase of park lot No. 40, in the town of Port Hope, and (2.) that the Master had improperly allowed to the present plaintiffs and the estates of the deceased trustees credit for the sum of $4,918.18 expended prior to the 1st day of January, 1860, in the erection of a dwelling house, outbuildings and fences on a farm of 40 acres belonging to the trust estate, inasmuch as the said expenditures were breaches of trust.

The further facts are clearly stated in the judgment.

Mr. *Attorney-General Crooks*, for the appeal.

Mr. *S. H. Blake*, Q. C., contra.

Strong, V. C.—By the will of *John David Smith*,

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who died on the 30th of March, 1849, certain property was given to the trustees for his son *David Smith*, but by a codicil the testator substituted the children of *David Smith* for their father, and devised the same property upon trust to be conveyed to them as they should attain the age of 21 years, and after some other directions not now material the codicil proceeded in these words: "And the rents, issues, and profits thereof in the meantime to be given and applied by my said executors towards the support and education of the said children of my said son *David*, if my said executors shall think proper, if not, to be by my said executors invested or otherwise disposed of by them to the best advantage for the said children at the discretion of my said executors. And I hereby will and devise that my said executors shall and may sell and dispose of all or any portion thereof, and invest the proceeds of such sale for the use and benefit of the said children of my said son *David*, equally, share and share alike, provided they, the said executors, shall consider it to be to the advantage of the children aforesaid or any or either of them to do so."

Judgment

A bill having been filed by the surviving trustees against *David Smith*, who had acquired by assignment the interest of three of his three children, a decree was made directing the Master at Cobourg to partition or sell the estate and take the accounts. In the Master's office all the *cestuis que trust* were made parties, and two of them, *William Ketcheson Smith* and *Lawrence Russell Smith*, the present appellants, objected to certain large items of credit in the trustees' accounts; the first being the sum of $6,144 paid by the trustees to Mr. *Meredith* on the 12th December, 1856, for the purchase of a park lot in the town of Port Hope, and the second of such items being the sum of $4,918.18, expended prior to the 1st day of January, 1860, in the erection of a dwelling house, outbuildings, and fences on a farm of 40 acres belonging to the trust estate.

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The Master allowed these disbursements, and I think rightly, although the park lot has since been sold under the decree in this cause for less than a fifth of its original cost. The evidence shews that the price paid for it was not, according to the market value of land in 1856 when the purchase was made, unreasonably large. The money, with which it was purchased, formed part of the trust estate and had been derived from sales of land and possibly from rents. The trustees were influenced in making the purchase by the consideration that the estate owned a mill site adjoining this lot and there were apprehensions of injury to this land of *Meredith's* by overflow if the mill-site was used, and in order to avoid any liability on this score the trustees thought it better to acquire the land. As to the expenditure in the building of the house and other improvements on the farm, this was with the object of providing a home for the *cestuis que trust*, the children of Mr. *David Smith*, and their parents who were in straightened circumstances at the time, and by whom the house was occupied as soon as it was completed. There cannot be the least question as to the *bona fides* of the trustees in both cases, and that being so they were at perfect liberty, under such a trust as that contained in the codicil, which gives them the widest possible discretion, to make any investment which in their judgment was proper.

Judgment.

The evidence shews that whether the expenditure was or was not judicious in point of fact the trustees honestly believed it to be so. And this concludes all question.

The law of this Court on this point is too familiar to require reference or demonstration. It is, however, well summarized by Mr. *Lewin* as follows : " Where a power is given to trustees to do or not to do a particular thing at their discretion, the Court has no jurisdiction to control the trustees in the exercise of that discretion

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There could not be a stronger case for the application of that rule than the present. I have seldom seen a more groundless appeal, and it must be dismissed with costs.

The defendants *William K.* and *Lawrence R. Smith* thereupon reheard the order drawn up on this judgment, and the same came on for argument before the Chancellor and Vice-Chancellor *Strong*.

Mr. *Crooks*, Q. C., and Mr. *English*, for the appeal.

Mr. *Blake*, Q. C., contra.

Judgment. SPRAGGE, C.—The judgment of my brother *Strong*, upon the appeal from the Master's report, states all the material facts of the case. I must, however, refer to the language in which the codicil to the testator's will is expressed. It directs that, until the period of distribution, the rents, issues and profits accruing from the property, shall "be given and applied by my said executors towards the support and education of the said children of my said son *David*, if my said executors shall think proper; if not, to be by my said executors invested or otherwise disposed of by them to the best advantage for the said children, at the discretion of my said executors." So far a discretion is given to the executors as to the appropriation of the rents and profits. The codicil then proceeds thus: "And I hereby will and devise that my said executors shall and may sell and dispose of all or any portion thereof," that is, of the corpus of the property, "and invest the proceeds of such sale for the use and benefit of the said children of my said son

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David, equally, share and share alike; provided they, the said executors, shall consider it to the advantage of the children aforesaid, or any or either of them, to do so." There is here a discretion given to the executors to "sell and dispose of" the whole or a portion of the corpus of the estate, or it may be, in the alternative, to retain it. In the event of a sale, they are directed to invest the proceeds, and the trust upon which such investment is to be made is declared. No discretion is given to the executors as to the mode of investment or upon what trusts.

If the question for the decision of the Court were as to the appropriation of the rents and profits, or as to the selling or withholding from sale of the corpus of this property, I should agree that, these being matters of discretion, all that the Court will look to will be to see that the discretion is exercised in good faith. But here the executors having, in their discretion, decided to sell, and having sold, it became their duty to invest; and the case presented is probably the same as if the testator had absolutely directed a sale, and had directed in general terms that the executors should invest the proceeds of the sale for the use and benefit of certain persons named.

Judgment.

The short question, then, appears to me to be, whether upon a trust to sell and to invest the proceeds of sale, trustees can apply the proceeds of sale in the way in which they have been applied here.

There can, I think, be no doubt that in England such an application of the proceeds of sale would be held not to be an investment which trustees would be authorized to make. Until the passing of Lord *St. Leonards'* Act, the investment would have to be in a particular class of English Government securities, and since then in classes of securities defined by the Act and the Court of Chancery under the Act.

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We had, it is true, no Government securities in Canada at the date at which the defendants received and applied the moneys, so that a literal compliance with English rule was impossible. It appears, however, from some of the earlier English cases, that trustees were held justified in investing in mortgages upon real estate, as well as in English funds; and in this country it was the constant practice of the Court, for many years, to invest the money of infants in real estate securities.

The fact of there having been at that date no Government securities in which to invest moneys, did not, in my opinion, leave it open to trustees to invest moneys in any way they might think fit. It is certain that the Court held the English rule to apply as to investments upon personal security, holding it to be a breach of duty, on the part of trustees, to invest moneys of the trust estate on personal security, or even to leave them on such security.

Judgment.

In this, I apprehend the Court proceeded upon the principle, that it is the duty of a trustee of moneys to do the best he can for their safety; and as an investment in mortgages upon real estate was a safe mode, and had been a recognized mode of investment here, there was no difficulty (until recently at any rate) in procuring safe investments upon mortgages of real estate. This is known to the Court from the fact of funds in its hands having been so invested, and indeed it is not suggested that there would have been any difficulty in so investing the funds in question.

Even where a discretion is expressly given to trustees they are not justified in investing on personal security unless that mode of security is expressly authorized, as was the case of *Forbes* v. *Ross* (*a*). In *Wilkes* v. *Steward* (*b*), executors were empowered to lay out a legacy in the

(*a*) 2 Cox, 116, by *Cooper* C. (*b*) G. Coop. 6.

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funds "or on such other good security as they could procure and think safe." They stated in their answer that they had so invested. The cause was heard on bill and answer and Sir *W. Grant* was "clearly of opinion that the defendants had no power to lay out the money upon personal security, that it was like trustees to sell, who would not be justified in selling for any other price than the best price that could be got."

The case is cited both by Mr. *Lewin* and Mr. Justice *Williams*. The rule is thus stated by Lord *Alvanley* in *Pocock* v. *Reddington* (*a*). "The rule upon this subject is, that when an executor or trustee, instead of executing the trust as he ought, by laying out the property either in well secured real estate or upon government securities, takes upon him to dispose of it in another manner, the *cestui que trust* may call him to account," &c.

Judgment.

I refer to these authorities to shew how limited is the discretion of a trustee as to the manner of investment according to the doctrine of the English Courts.

In the case before us the executors appear to me to have exceeded their authority to a greater extent than has been the case in any of the cases that we find in the books. They have as I think not *invested* the money at all, but have applied it (I allude to the two sums in question) in a manner not at all authorized by the testator. The case of *Dickinson* v. *Player* (*b*), is an instructive case upon this point. The testator set apart £15,000 for his children, which his executors were at liberty to invest in any manner they thought proper at interest. In disposing of his residuary estate his language was different, "the remains of my property I direct to be applied in any manner my executors shall think proper, the interest and produce thereof I give,"

(*a*) 5 Ves., 800.

(*b*) C. P. Cowp. 178.

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&c. The testator had been in business, and one of his sons was a partner with him when he died, and the business was continued by some of the sons after his death, and a considerable part of the residuary estate was left in the business at interest, and it was in respect of this that the question arose. Lord *Langdale* fastened upon the word "employ" as an authority to the executors to do what they did. He said that the word "employ" had in his judgment a different meaning from the word invest; both words were to be found in the will—that if the latter word had been used in reference to the residue, it would have been very questionable whether it could have been lent except upon real or Government securities.

Judgment.

In an old case before Lord *Macclesfield*, *Cock* v. *Goodfellow* (*a*), the testator directed certain estates to be "placed out to interest or other way of improvement by the consent of the majority of the guardians" of his children. It was contended that the words "or other way of improvement" authorized the employment of the fund in trade. Lord *Macclesfield* held that the words used must be understood as "exclusive of trade, so that it was never the intention of the father that the fortunes of the children should be hazarded in the way of trade." The question was between the assignee of a bankrupt and the children of the testator.

Mr. *Lewin* (*b*) cites this case and *Dickinson* v. *Player* as authority for the position that "a power to place out at interest, or other way of improvement, will not authorize the investment of the money in any trading concern, or, in fact, any investment but a government, or real, or other unobjectionable security," meaning, as I take it by the latter words, investments authorized under Lord *St. Leonards'* Acts; and he adds, referring

(*a*) 10 Mod. 489. (*b*) 5 Ed., p. 260.

to *Dickinson* v. *Player*, that the distinction founded upon the word "employ" "appears too thin to be relied upon with safety." 1876. Smith v. Smith.

My conclusion is, that the employment of any portion of the proceeds of the sale of the corpus of the estate, in the erection of a house, and in the purchase of land, was an application of such money in a manner not authorized by the words of the codicil. The trustees, I have no doubt, thought that in so applying these moneys they were doing the best that could be done for the interest of these children; they probably thought they might exercise their discretion in the matter.

I am obliged to differ from my brother *Strong* on this point. In my opinion, the codicil gave them no discretion as to investment, beyond what was conveyed by the mere use of the word "invest," and I think that word is to be read as it was read by Lord *Langdale* in *Dickinson* v. *Player*. Judgment.

If any portion of the rents, issues, and profits of the property was used in the building of the house or the purchase of the land in question, any of such money so used would not, in my opinion, be misapplied, for, as to them, a very wide discretion is given to the trustees.

We were referred, upon the re-hearing, to a clause in the testator's will (not in the codicil), empowering the trustees "from time to time to alter and vary the nature of the estate so devised in trust, as aforesaid, and to demise, lease, and to farm let the same, or any part or portion thereof," with the consent of the *cestui que trust* when of age, and in their own discretion when the *cestui que trust* is not of age. I do not think that this provision can be held to be applicable to the property given by the codicil to the grand children. The codicil distinctly directs how that property is to be dealt with;

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it does not merely substitute these children for their father, but takes that portion of the residuary estate out of the general provisions of the will, and makes specific provision in regard to it. In my opinion we can only look to the codicil for the trustees' authority to deal with the land to which it relates.

STRONG, V. C., remained of the same opinion as on the original argument of the appeal, and, therefore, the order then made stood affirmed.

The same defendants thereupon appealed to the Court of Error and Appeal, assigning as reasons therefor that the defendants, *Lawrence Russell Smith* and *William Ketcheson Smith*, the appellants from the orders of the Court of Chancery made in this cause, dismissing their appeal from the Master's report therein, submit that the said appeal should have been allowed and the said report altered accordingly, upon the grounds in their notice of appeal from the said report particularly mentioned, and which grounds the said defendants urge and insist upon in this appeal to the Court of Error and Appeal for allowing their appeal from the said report of the said Master, and for discharging the said orders of the Court of Chancery.

Statement.

The plaintiffs submitted that the said report and orders should be affirmed for the following, amongst other reasons :

(1.) For that the trustees had unlimited discretion as to the manner of investment, and acted in good faith and according to the best of their judgment in making the several investments complained of by the appellants; (2.) that the special circumstances brought out in evidence as to the position of the park lot purchased, and the desirability of providing a home for the *cestuis que trustent*, justified the items of expenditure complained

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of herein ; (3.) because the respondents (the trustees) having brought in the said properties as part of the estate, the said appellants consented to the same being sold in this suit, and *David Smith* became the purchaser thereof and afterwards resold the same at a profit, partly for their benefit, without their having raised, and long before they raised, any objection to the propriety of the said expenditures, and they thereby acquiesced in and confirmed the said expenditures, and accepted the said investments ; (4.) because the appellant *Lawrence Russell Smith*, was by his proved acts, deeds, letters, and admissions, shewn to have acquiesced in the said expenditures, and was precluded from objecting thereto ; (5.) because the Mortgagors, under whom the said *Lawrence Russell Smith* claims as Mortgagee, and for whom he held the shares claimed by him, had acquiesced in the said expenditures and could not, and, in fact, did not object to the same , (6.) because the dealings and conduct of the appellants had been such as to disentitle them to relief.

Argument.

Mr. *Crooks*, Q. C., and Mr. *English*, for the appellants. The question in this case arises in respect of two sums of money belonging to the trust estate, one as appears in the printed case paid to Mr. *Meredith* for the price of a lot of land; the other being an amount paid for the erection of a dwelling house and other improvements on land belonging to the trust. The duty of the trustees was to invest all moneys received from the sale of lands—not in the purchase of other real estate, or in expending the same in improving other portions of the trust estate. This was such an unauthorized application of the trust moneys as rendered the trustees liable in case of loss to make it good to the estate. On this point the views expressed by the Chancellor on the rehearing is the correct one, and the only one that the Court can apply safely, having in view the duties and liabilities of trustees, and the rights and interests of *cestuis que trust.*

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Here the trustees had the fullest and most uncontrolled discretion in respect to their dealings with or the application of the rents of the realty received by them; aside from this their discretion was only as to selling and converting the estate, but not as to the securities they should place the funds in, as to them they were bound to invest in such a manner as the Court would authorize.

There is no such acquiesence by the appellants shewn as precludes them from complaining of any misapplication of the trust funds. True, it is shewn that *William K. Smith* ratified the proceedings which had been taken in the cause with a view of realizing the estate, but this clearly had nothing whatever to do with the liability of the trustees.

Argument.

Here, should this Court adopt the view taken by the learned Vice Chancellor on the appeal from the Master's report, the appellants ask an opportunity of shewing conclusively that these sums should not be allowed, and for that purpose desire a reference in order to adduce further evidence, subject to the payment of costs.

Mr. *Moss*, Q. C., and Mr. *Boyd*, for the respondents. If the appellants here have not shewn sufficient grounds for the disallowance of these two sums this Court will not for a moment think of again referring it to the Master simply to afford them an opportunity of establishing this claim against these trustees, who have been shewn to have acted throughout their dealings in respect of the trust estate, with the utmost good faith and integrity; and if any act of theirs has turned out detrimental to the trust, it has arisen from an error in judgment, and from causes which no reasonable amount of foresight and precaution could have prevented.

In this will nothing is said as to providing an income

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for the parties interested, and even in England where an income is not required, an investment by trustees in real estate would be good, although, as pointed out by the learned Chancellor in his judgment, there are there certain recognized securities or funds in which only they are warranted in placing the moneys of their *cestuis que trust* Here the will we submit contemplates the selling and investing the proceeds of such sales in the purchase of other real estate.

[HAGARTY, C. J.—You put that too broadly; perhaps the safest ground is, that the trustees had ample discretion to act in such a manner as they might think would add to the value of the estate, for the benefit of the parties interested, and which was done here in the strictest good faith.]

Argument.

Putting it at the very lowest, the trustees here must be allowed a reasonable discretion to act for the benefit of the estate, and the evidence establishes that a valuable portion of the trust estate—a mill privilege—was liable to be lost if the purchase of the land from *Meredith* was not effected, and the purchase was accordingly made by the trustees in perfect good faith. True that property has since become most unexpectedly depreciated to an immense extent, otherwise the purchase would not only have been justified as an advantageous investment at the time; but would have continued good to the present time. Indeed it may reasonably be contended that the evidence shews such a state of things as would have induced the Court to sanction it in the first instance, in order in fact to save the trust estate.

The expenditure on the building of a dwelling house for the habitation of the *cestuis que trust* was clearly one for their general benefit; and as such, one that the trustees were warranted in making; besides it is distinctly found by the Master that the *cestuis que trust*

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had aquiesced in all that had been done by the trustees; that is, the Master finds that the parties interested had by their conduct precluded themselves from objecting to the acts of the trustees in these respects. What these *cestuis que trust* in effect seek to do is, after having adopted the purchase as a portion of the trust estate, now to turn round and endeavour to charge the trustees with the amounts expended. *Vyse* v. *Foster* (*a*); *Forshawe* v. *Higginson* (*b*); *Molyneaux* v. *Rowe* (*c*); *Webb* v. Lord *Shaftesbury* (*d*); *Winchelsea* v. *Norcliffe* (*e*); *Terry* v. *Terry* (*f*); and *Walker* v. *Symonds* (*g*), were referred to.

Mr. *English*, in reply referred to *Zambaco* v. *Cassavetti* (*h*).

Judgment.

DRAPER, C. J.—The difference of opinion between the learned Chancellor and my brother *Strong* in the Court below, has made it necessary for me to consider this case as carefully as I am able.

Two questions of alleged unauthorized appropriation have been raised:

1. The expenditure of trust moneys in purchasing a lot of land for the (supposed) advantage and improvement of a part of the trust estate.

2. The erection of a dwelling house, &c., on a farm, another part of the trust estate, which house was intended for the residence of *David Smith*, the father of the *cestuis que trust*, two of whom, *Lawrence Russell Smith* and *William Ketcheson Smith*, are the appellants.

(*a*) L. R. 8, Ch. 309.
(*b*) 8 D. M. & G. 827.
(*c*) 8 D. M. & G. 368.
(*d*) 6 Madd. 100.
(*e*) 1 Ver. 435.
(*f*) Finch's Prec. 273.
(*g*) 3 Swan. 1.
(*h*) L. R. 11 Eq. 439 at 445.

Both these expenditures, owing to an unexpected depreciation in the value of real estate, caused loss to the trust estate. 1876. Smith v. Smith.

The powers of the trustees were created by a codicil to the will of *John David Smith*, as follows: "And the rents, issues, and profits thereof (*i.e.*, of certain real estate and property previously mentioned) in the meantime to be given and applied by my said executors towards the support and education of the said children of my said son *David* if my said executors think proper; if not, to be by my said executors invested or otherwise disposed of by them to the best advantage of the said children, at the discretion of my said executors; and I hereby will and devise that my said executors shall and may sell and dispose of all or any portion thereof, and invest the proceeds of such sale for the use and benefit of the said children of my son *David*, equally, share and share alike, provided they the said executors shall consider it to be to the advantage of the children aforesaid, or any or either of them, to do so." Judgment.

The purchase of the lot of land is supported on the assertion that it adjoined the trust estate on which there was a mill-site not then put in use, and there was reason to apprehend that the full water power could not be obtained without partially overflowing this lot. For this reason the trustees bought it at a price not considered unreasonable at the time. The not foreseeing the fall in price, of real estate, ought not I think to be visited on the trustees as a breach of trust, unless some inexorable principle compels it. I do not, however, find any English authority which is distinctly in their favour; and yet it is not difficult to suppose a case in this country in which a Court of Equity would not as I think hold that there was a breach of trust, and which could not be in principle distinguished from the

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present. Suppose this testator had erected a mill on his property and soon after died having made just such a will as above set forth, and the trustees discovered that unless some land adjoining were purchased the mill would be comparatively worthless, as without raising the head of the water, and thereby overflowing this land, the mill could not be profitably worked. Would not this purchase be upheld as a proper investment honestly made for the advantage of the children? And here, when the *bona fides* of the trustees is unassailable, this motive to preserve, if not directly to add to the value of the estate and the expenditure, being within the literal meaning of the words "provided the said executors shall consider it to be to the advantage of the children," I cannot bring myself to hold such expenditure a breach of trust.

Judgment.

The building of the house is, however, a more questionable transaction. The reason of appeal from the Master's report on this point is, that the Master should not have allowed to the plaintiff and the estates of the deceased trustees credit for the sum of $4,918.18 expended prior to the 1st January, 1860, in the erection of a dwelling house, outbuildings and fences on a farm of 40 acres belonging to the trust estate.

Now in the Master's report, there is an express finding "that all the *cestuis que trust,* since they came of full age, have, by their acts, precluded themselves from charging the said purchase and expenditure to have been breaches of trust."

No notice of this finding is taken in the reasons of Appeal. On the other hand the respondents, among their answers to the reasons of appeal, rely on the acquiescence of all the *cestuis que trust,* and I do not find any reference to it in the Chancellor's judgment, and the reason is obvious—it was not urged at the rehearing before him.

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But taking this finding as establishing the fact of acquiescence, I feel justified in concurring in what I understand to be the opinion of the majority of the Court, that it affords a sufficient ground for dismissing the appeal with costs.

SPRAGGE, C.—The argument in appeal has not at all changed my opinion upon the law of the case. I still think, as I said in my judgment upon the re-hearing, that the purchase of land and building of a house was not an application of the moneys of the estate which the trustees were authorized to make under the codicil to the testator's will; and I still think that the clause in the will does not apply to the funds of the sons of *David*. I have given my reasons upon both these points in my judgment given at the re-hearing.

In the argument of the appeal the application of these moneys is sought to be justified upon the facts and circumstances disclosed in the evidence; whether it can be so justified is another matter. Judgment.

I incline to think that if it can be supported, it can only be upon the principle of acquiescence, which was not argued before me on re-hearing.

I am not at all sorry that this Court has been able to see its way in relieving the trustees from the consequences of their act, for I have no doubt that they acted in good faith, and to the best of their judgment, for the interest of all the estate.

Per curiam.—Appeal dismissed with costs, SPRAGGE, C., dissenting.

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Snell v. Davis.

Will, construction of.

The testator devised his land to his son, an only child, for ever, his wife to have it as long as she lived or remained his widow, and then proceeded: "And if my son die and she marry, all to come to my brothers and sisters equal share alike." The widow married during the lifetime of the son, who subsequently, without ever having married, died intestate:

Held, that the widow took the property as heir of the son.

This was a bill by the brothers and sister of the late *Thomas Snell* who died after having made a will in the words following:

"This is my last will and testament, that I give and bequeath the south half of lot 17 in the Second Concession, Township of Stephen, County of Huron, being
Judgment fifty acres to my son for ever, *George Snell*, son of *Thomas* and *Mary Snell*, in the Township of Stephen. And my wife *Mary Snell* to have it as long as she liveth, or while she remains my widow. "November 3, 1851.—And if my son die and she marry, all to come to my brothers and sister, equal share alike.

his
"Thomas Snell, ×
mark.

"Witness, Hugh Balkwill,
Richard Balkwill,
George Snell."

The widow *Mary Snell* married again, and subsequently *George Snell*, the only child of herself and the testator, died without ever having been married and intestate. The plaintiffs thereupon claimed that they were entitled to the property under the devise to them in the will, and instituted the present suit seeking to have a declaration to that effect, and partition accordingly.

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Snell v. Davis.

The widow demurred for want of equity.

Mr. *Boyd*, in support of the demurrer.

Mr. *George Murray*, contra.

BLAKE, V.C.—By the first clause in the will the testator gave his son *George* an estate in fee simple in the premises in question. By the second clause he postponed the enjoyment of this estate until after the death or marriage of his widow, who was to have the property in the meantime. During the lifetime of the son the widow married, and thereupon his estate in the land became one in possession. It is argued for the plaintiff that, as the son has since died, the following clause in the will divests him of his estate, and that the land goes over—"and if my son die and she marry all to come to my brothers and sister, equal share alike." I do not think the certain and absolute estate given to his son by the testator in the first part of the will is taken from him by this clause. In some respects a more common sense rule than that established in *Edwards* v. *Edwards* has been introduced, but the canon of construction propounded in that case, which is applicable to the present, has not been disturbed, and it, to my mind, governs this will. Death is a certain event. The testator speaks of it as contingent. There must be some other event taken in connection with the death in order to raise the contingency. The only period mentioned in the will, which can be referred to here, as the one creating a contingency in connection with the death, is the marriage. I think this clause must be read, "and if my son be dead at the time she marry all to come," &c. At the time of the marriage the son was alive and enjoying his estate, which I do not think can be taken from him by the, at least, very doubtful construction put upon the will by the plaintiff. The son being dead the mother takes the premises. The plaintiffs are, therefore, not

Judgment.

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McMurray v. Northern Railway Compafy.

Pleading—Demurrer—Proper frame of bill.

It is unfair for a plaintiff to file a bill making grave charges against the defendant unless they are put upon the record in such a shape as will enable the defendant to meet them by answer, instead of driving him to the unsatisfactory course of defeating them by demurrer.

A bill was filed by a shareholder in a railway company complaining of the misconduct of the managing director against the managing director and the company, on behalf of the plaintiff and all other shareholders not made defendants; to which the defendants demurred on the ground, amongst others, that the bill should have been by the company, which on argument was allowed with liberty to amend; and, thereupon, the plaintiff amended by charging that the managing director and the other directors held proxies sufficient to control, and did control the corporation, and had caused the company to adopt and confirm the illegal acts of the managing director; and that, controlling as they did the meetings of the bondholders and shareholders, it would be idle and useless to have a general or special general meeting of the bondholders and shareholders called for the purpose of obtaining a direction from them to the directors, to file a bill against the managing director to bring him to an account. The defendants demurred for want of equity, which was allowed; but without costs, as the defendants had raised grounds of demurrer, which had been overruled on the argument of the demurrer to the original bill.

The proper manner of framing a bill in such a case considered and stated.

Statement.

The facts of this case are fully stated *ante* vol. xxii., page 476. After the judgment there reported was given, the plaintiff amended his bill in the manner set forth in the head note and judgment; and the defendants again demurred for want of equity.

Mr. *G. D. Boulton* and Mr. *A. Campbell*, for the demurrer.

Mr. *Maclennan*, Q.C., and Mr. *Huson Murray*, contra.

The points relied on and authorities cited were similar to those on the former argument.

Blake, V. C.—In order to comprehend the causes of demurrer assigned in argument it would have been necessary to have set out the greater portion of the bill filed. The full report of the case in 22 Gr. 476, saves the necessity for a repetition of the matter there fully dealt with. The Chancellor has held that the original bill was demurrable, as sufficient ground was not shewn for the proceedings being taken in the name of the plaintiff; that *prima facie* such a bill as the present should be filed in the name of the company, but that circumstances might be shewn which would justify such step being taken on the part of a shareholder. I have to consider whether that which was pointed out by the Chancellor as making this bill defective, has been removed, and whether, in removing this defect, the plaintiff has not been led to the making of statements which for other reasons render the pleading demurrable.

Judgment.

The judgment of the Chancellor shewed clearly the circumstances under which this bill could be sustained by the present plaintiff, and if the circumstances pleaded in paragraphs 31*a* and 34 had been confined to the defendant *Cumberland*, then, I think, the infirmity in the pleading would have been removed, and the bill could have been sustained against the demurrer.

On the argument of this demurrer it was contended on the one hand, and admitted on the other, that the present directors were parties to the suit, by representation through the named plaintiff.

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These persons then as co-plaintiffs place this allegation upon record. "The said *Frederick William Cumberland* and the other directors of the said company have from time to time held, and they now hold the proxies of a majority of the bondholders and shareholders of the said company, and by means thereof they have controlled and now control the corporation, and have caused the corporation to adopt and confirm, as the corporation has, in fact, adopted and confirmed the illegal and fraudulent acts herein complained of, and the said corporation so controlled has permitted a long time to elapse, as, in fact, a long time has elapsed since the commission by the said defendant, *Frederick William Cumberland*, of the said several breaches of trust of which they have had notice and yet they have not interfered to prevent the said *Cumberland* continuing to act, as, in fact, he is continuing to act in the same manner, nor by suit in this honourable Court, or otherwise to make him account for the breaches of trust already committed by him." Clause 31*a*.

Judgment.

And again "The said defendant *Frederick William Cumberland* and the said other directors holding a majority of the proxies of the bondholders and shareholders as aforesaid, and, in fact, thereby controlling as they do the meetings of the shareholders and bondholders of the company, it would be idle and useless to have a general or a special general meeting of the said bondholders and shareholders called for the purpose of obtaining a direction from them directing the directors of the said company to file a bill in this honourable Court against the said defendant *Frederick William Cumberland* for the purposes sought in this suit, or to take other means to bring the said defendant *Frederick William Cumberland* to an account for his malversation in office as aforesaid and his said general breaches of trust." Clause 34.

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These plaintiffs, directors, no longer hold the position which they did under the original bill. There they were merely passive. Treating them as trustees they did not interfere with that which was being done by the defendant detrimental to their *cestuis que trustent*, and they might well say there is nothing anomalous in our allowing our names to be used with those of our *cestuis que trustent*, who choose to take proceedings to remedy a wrong done us. But here that whole matter is changed. The directors, plaintiffs by representation, complain, along with the other plaintiff, that they are prevented from taking those steps which must be *primâ facie* taken in the name of the company, because, as they allege, the defendant *Cumberland*, and they the plaintiffs, directors, now hold a majority of the proxies, and, therefore, can control, and do control the corporation. But this does not shew conclusively any ground for complaint. The proxies which the plaintiffs, directors, hold may, for all that appears on the bill, be quite sufficient to enable them to control the action of the Board, and if this be so, they have no right to come to this Court as plaintiffs, but they should use the name of the corporation and by it as plaintiffs initiate proceedings against the defendant *Cumberland*. There is nothing to shew the proportion of proxies held by *Cumberland* and the proportion held by the directors, nor is there anything to shew but that these very plaintiffs, directors, who come and allege that they and *Cumberland* control the meetings of the shareholders and bondholders could not call such a meeting and thereat pass a resolution that proceedings should be taken to call their managing director to account. It seems to me, therefore, that this argument of necessity ceases to exist, as there is nothing on the record to shew, but that these very plaintiffs, directors, who now by bill ask for an account againt their managing director, and who have not the right to do so unless the company cannot be procured as plaintiffs, could not at their next meeting, use their proxies to procure the filing

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of such a bill. The coming to the Court by them as co-plaintiffs shews they desire an account, and there is no allegation in the bill, but that they can control the proceedings at the Board meetings, so as to bring this about with the company, as plaintiff. The plaintiff might have alleged that *Cumberland* controlled the board, and upon that have asked relief in his own name, on behalf of all the corporation but *Cumberland*, or he might have alleged that *Cumberland* and the directors or certain of them controlled the board, and have asked relief in his own name on behalf of all the corporators but *Cumberland* and such directors, but he has adopted neither of these courses, and has presented a case which to my mind cannot stand before a demurrer. If the suit had been framed in either of these ways then I think the pleading would have been brought within *Atwood* v. *Merryweather* (*a*); facts would have been disclosed which necessitated the departure from the ordinary rule. It sufficiently appears that it would be useless to take steps to set the corporation in motion, as they would inevitably fail. The defendants have again raised grounds of demurrer, which were overruled on the former argument. These I must, following and concurring in that decision, again overrule here, and so cannot give the defendants the costs of the demurrer. Liberty to amend to be given to the plaintiff.

Judgment.

It is scarcely fair to the defendant *Cumberland* that the plaintiff should not at once place his record in such a shape as will enable him to meet the grave charges made against him in the bill by answer, rather than drive him to the eminently unsatisfactory course of defeating them by demurrer.

(*a*) 37 L. J. ch. 35, L. R. 5 Eq. 464 *n*.

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Hawke v. Niagara District Mutual Fire Insurance Company.

Fire insurance—Interim receipt—Mortgaging property insured—Notice of loss—Return of premium—Failing in some defences—Costs.

The plaintiff applied to the agent of the defendants to effect an insurance on certain buildings. The agent accepted the risk, and gave to the plaintiff the usual interim receipt, which stated "the said party and property to be considered insured until otherwise notified, either by notice mailed from the head office, or by me, to the insurer's address within one month from the date hereof, when, if declined, this receipt shall become void and be surrendered. N. B.—Should applicant not receive a policy in conformity with his application within twenty days from the date hereof, he must communicate with the Secretary direct, as after one month from this date the receipt becomes void." The agent omitted to transmit the application to the company, and the plaintiff, not having been notified, applied personally to the agent, who stated such an occurrence was not unfrequent, and by way of satisfying the plaintiff, granted a fresh interim receipt, repeating this on four several occasions :

Held (1), that such renewed interim receipts were valueless, there being, in fact, no new insurance effected: (2) that the neglect of the agent to do his duty by forwarding the application to the company, could not operate to the prejudice of the plaintiff; and (3) that the mere lapse of a month without any notice to the assured did not render the receipt void; but the stipulation gave the company a month during which to consider the application, and enabled them to terminate the risk within that period: but in such a case, if the company does not intimate an intention of terminating the risk, then there is a contract for insurance for the year binding on the company, on the same terms and conditions as the ordinary policies of the company.

By a by-law (No. 16) of the company it was declared that certain circumstances would vitiate the policy unless notice were given, the consent of the board obtained and indorsed on the policy, and signed by the President and Secretary.

Held, that the word *policy* here meant *insurance* or some equivalent, and that the plaintiff, holding such interim receipt, was not exonerated from giving the notice required, as the consent might be indorsed on the receipt.

One of the circumstances which the by-law (16) declared would vitiate the policy, unless notified in writing to the Secretary, consented to by the board, and indorsed, was that "of alienating by

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mortgage or otherwise, or any change in the title or ownership of the property insured." A few days after obtaining the first interim receipt, the plaintiff mortgaged the property, which he notified verbally to the agent, who was otherwise well aware of the transaction, but no notice in writing was given to the Secretary.

Held, that such want of notice in writing to the Secretary vitiated the policy; but *quære* what the conclusion should be if notice, though not in writing, were traced home to the company.

By the rules of an insurance company no insurance on houses would be effected for more than two-thirds the value of the premises exclusive of the value of the land. The owner of houses applied for insurance to the extent of $5,850, having previously effected an insurance in another company to the extent of $5,000, and the copy of his application produced at the hearing shewed the value to be $8,500. This the claimant swore, *if* a true copy, was an incorrect statement of the value, as the actual cost of the buildings insured was upwards of $15,000.

Held, that as this was not an over-valuation to the prejudice of the company, the plaintiff should be allowed, in a suit to enforce payment of the insurance money, to shew the true value.

One of the by-laws of an insurance company provided that a detailed account of any loss verified by oath was to be given to the company within thirty days after the loss sustained: and in case of any misrepresentatation, fraud, or false swearing, the assured should forfeit all claim by virtue of his policy; and the Act of the Legislature (36 Vic. ch. 44, O.,) also required such proof to be given within thirty days after the loss sustained. The assured considering it unnecessary to do so, did not give the proof until after the thirty days had elapsed:

Held, that under such circumstances the claimant could not recover the amount of his loss: but *semble*, if the proofs had not been furnished by reason of accident or mistake, relief might have been afforded him.

Where a risk has once begun to run and is subsequently avoided by some neglect or default of the assured, there cannot be a return ordered of any portion of the premium.

Where an insurance company set up several defences, some of which they failed to substantiate, the Court on dismissing the bill did so without costs:

Patterson v. *The Royal Insurance Company*, ante volume xiv., page 169, followed.

Statement

This was a suit by *George M. Hawke* against *The Niagara District Mutual Fire Insurance Company.*

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The facts appearing in the case were that the defendants had an agent in Toronto, one *R. G. Hirschfelder*, whose duty it was, as testified by their Secretary, Mr. *Giles*, to receive applications; to receive premiums in cash; to take notes for premiums if insured in that way; to transmit applications and money or notes to the head office, and to receive back the policy for the insured. That on the 10th March, 1874, the plaintiff applied to *Hirschfelder* for an insurance on the property in question to the amount of $5,850, and *Hirschfelder* calculated the amount of the premium, which, after deducting an allowance on a policy then in existence on a portion of the property, amounted to $155.10; the plaintiff paid this to him and received an interim receipt, on a printed form, in the following terms:

Statement.

"Received from *George M. Hawke*, Esq., the sum of $163.80, being the premium for an insurance of $5850 upon—as per application—for the term of one year as described in application; and also on the conditions only therein expressed, bearing date this day, subject to the approval of the Board of Directors in St. Catharines, and to the clauses and conditions of the policy when issued. The said party and property to be considered insured until otherwise notified, either by notice mailed from the head office, or by me to the insurer's address, within one month from the date hereof, when, if declined, this receipt shall become void and be surrendered.

"N.B.—Should applicant not receive a policy in conformity with his application within twenty days from the date hereof, he must communicate with the Secretary direct, as after one month from this date the receipt becomes void.

"Dated this 10th day of March, 1874.

"R. G. HIRSCHFELDER, *Agent.*"

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The mode in which the premium was calculated appeared in a memorandum left with the receipt, as follows:

Amount of premium for $5,850	$163 80
" Two months' car. risk.....	5 00
" Six weeks' insurance on $1,000, from 12th Jan. to 1st March...	6 30
	$175 10
Less amount of allowance on Policy 4761	20 00
	$155 10

Statement.

A paper, Exhibit "H.," purporting to be a copy of the application of the plaintiff, was produced from the custody of the defendants, but there was no evidence to shew how it got there, nor of its being a true copy; *Hirschfelder* could not be found. He had been dismissed from the service of the Company in January, 1875, for irregularities in his accounts not connected with the transaction in question. There were several discrepancies between it and the receipt, making it doubtful if it was a true copy of the application. It was dated the 19th March, 1874, while the receipt referring to an existing application, was dated the 10th of the same month. The amount of premium specified in it was calculated at the rate of 2.40 per cent., making $140.40, while the sum in the receipt had been arrived at by calculating at a rate of 2.80 per cent., making $163.80.

The one that was signed by the plaintiff was sworn to have been on the property mentioned in this application, and it was prepared by *Hirschfelder*. The one produced stated the value of the property insured to be $8,900; which, if so stated in the original, was sworn to be a mistake, and that the actual cost of the buildings insured was upwards of $15,000.

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The policy not having been received by the plaintiff within the twenty days, he made frequent application to *Hirschfelder* on the subject, who assured him it was not unusual for such delays to occur, but that to make it all right he would give another receipt. A similar receipt was accordingly given by *Hirschfelder* to the plaintiff, but specifying the premium as $140.40, the same as mentioned in the copy of application produced, which the plaintiff seems to have received without remark, though he said it was a mistake, as the property insured and the amount were intended to be the same. Five receipts of this nature were got month by month to keep the insurance on foot, but the amount of premium stated in them could not be ascertained, as all except the two produced were destroyed in the fire that occurred.

Statement.

One of the buildings insured was destroyed on the 28th July, 1874. The agent was present at the fire. The plaintiff applied to him the day after the fire to know what was to be done: he said he would write to the head office, which he seemed to have done, though the letter was not among the exhibits. It appeared to have been shewn to the Secretary and marked "T." on his examination before the Master at St. Catharines, and a copy of a telegram was proved then, dated 1st August, 1874, from the Secretary to *Hirschfelder*, saying, "Have no such risk; never received *Hawke's* application."

The plaintiff, becoming apprehensive that an affidavit was necessary, made an affidavit of this loss on the 31st August and sent it to the Secretary, being more than a month after the fire.

The defendants resisted the claim of the plaintiff, because the receipt was void after thirty days from its date, and the agent had no power to grant renewal receipts: that the application shewed the value of the property to be $8,500, and there was an insurance in

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another Company to the extent of $5,000: that the non-communication of incumbrances or of alienation avoided the insurance; and that not giving the notice of loss to the Secretary within thirty days, was also fatal.

The defendants denied having received either the application or the premium from the agent.

At the time of making the application and paying the premium there was no incumbrance on the property, but a mortgage to The Trust and Loan Company was made by the plaintiff on the 28th of March, of which the agent had notice, though no notice appeared to have been given to the Secretary.

Argument.

Mr. *Blake*, Q.C., and Mr. *Wells*, for the plaintiff. The plaintiff left his application with the agent of the defendants, and it was the agent's duty to transmit it to them; and the plaintiff was to be considered as insured until notified to the contrary, the agent having renewed the interim receipt from time to time. The money paid by the plaintiff to the agent on the occasion of obtaining the first receipt must, on the expiration of the thirty days mentioned in it, be considered as applicable for the purpose of the fresh contract; for on the expiration of the time limited by the first receipt the money would thereupon become the plaintiff's, and he would be entitled to apply it as he thought best. The contract, it is alleged by the defendants, had become void by reason of certain by-laws or conditions indorsed on the policy. Here, however, no policy was ever completed, and the conditions relied on do not in terms apply to an interim insurance. The assured cannot be required to comply with the conditions of a policy when no policy has been issued to him; and the same observation applies to the condition on the policy in respect of the assured mortgaging the property. The defendants were duly notified of the loss, but what they now complain of is

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that a detailed statement or account of the loss sustained by the plaintiff was not furnished to them. *Patterson* v. *The Royal Insurance Co.* (*a*), *Penley* v. *The Beacon* (*b*), *Henry* v. *The Niagara District Agricultural Insurance Co.* (*c*), *Wyld* v. *The London, Liverpool and Globe* (*d*), and the cases there cited were referred to.

Mr. *Moss*, Q.C., and Mr. *C. Brown* contra. The whole scope of the argument on the other side is, that plaintiff is now in a better position by having only an interim receipt than if a policy had actually issued in his favour; but this is impossible, and the plaintiff in reality is now coming to this Court saying that a policy ought to have been issued to him; and that the jurisdiction of this Court rests upon its right to decree the issue of the policy, which, of course, will contain all the usual conditions, one of which required notice of the mortgage to be given, which has not been done. The interim receipt itself has a notice in it that if the insured did not receive his policy within twenty days he was to communicate direct with the Secretary of the Company. This was surely sufficient to put him on the alert, and had he given the notice required he would have been informed that no policy was existing in his favour. The statute 36 Vic. ch. 44, sec. 52, requires that proof of loss be furnished. This must be given to the head office—it is not sufficient to give it to the agent; but here even that was not done, plaintiff contenting himself with simply giving the agent of the company a verbal notice of the loss. This was clearly insufficient. *Greaves* v. *The Niagara District Mutual Insurance Co.* (*e*), *Mulvey* v. *The Gore District Mutual Insurance Co.* (*f*), *Martin* v. *The Home Insurance Co.* (*g*), *Williamson* v. *The Gore District Mutual Insurance Co.* (*h*), *Muma* v. *The*

Argument.

(*a*) 14 Gr. 169.
(*b*) 7 Gr. 130.
(*c*) 11 Gr. 125.
(*d*) 21 Gr. 448.
(*e*) 25 U. C. R. 12.
(*f*) 25 U. C. R. 424.
(*g*) 2 U. C. C. P. 424.
(*h*) 14 U. C. C. P. 424.

1876. *Niagara Mutual Insurance Co.* (*a*), *Stickney* v. *The Niagara District Mutual Insurance Co.* (*b*), were referred to.

Hawke v. Niagara District Mutual Fire Insurance Co.

PROUDFOOT, V. C.—I am of opinion that the interim receipt does not become void by the mere lapse of a month from its date. The person receiving it is "to be considered insured until otherwise notified, within one month from the date, when, if declined, the receipt shall become void and be surrendered." This gives the company a month during which to consider the application, and enables them to terminate the risk, if they choose, within that period; but, if they do not intimate such an intention, then it is a contract for insurance for the year.

Judgment.

The "N.B." to the receipt adds no additional term to what is contained in the body of it. It is intended to call attention to the conditions specified in the receipt—to *note well* what is there said; and to advise the applicant if he do not receive the policy within twenty days to be prepared for the contingency of the company declining the risk. It is true the plaintiff and the agent seem to have thought it would be void, and resorted to the expedient of renewing the receipt. But this was done under an erroneous impression of the effect of the receipt, and at the suggestion of the agent himself for the purpose of keeping it all right; and it would be unjust to bind the plaintiff to such a construction.

The application is said not to have been transmitted to the Company, and they had no opportunity of considering it; but the language of *VanKoughnet*, C., in *Patterson* v. *The Royal Insurance Co.* (*c*), answers this

(*a*) 22 U. C. R. 214. (*b*) 23 U. C. C. P. 372.
(*c*) 14 Grant 169.

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objection. There also the agent had failed to communicate the risk, and the Chancellor says: "I should, I think, hold that by means of this receipt, and the payment of the money which it acknowledges, an insurance was effected binding on the company, and that it continued to be binding up to and at the time of the fire; no rejection of it having taken place in the meantime. The company, it is true, had no opportunity to reject, because their agent had never informed the manager of the risk; but they, not the plaintiff, must suffer by his neglect or fraud. The plaintiff was not bound to see that *McLeod*, the agent, did his duty to the company. He had a right to presume that this was done, and he heard nothing to the contrary."

I hold, therefore, that by the signing of the receipt of the 10th March, 1874, and the payment of the money which it acknowledges, an insurance was effected for a year, binding on the company, unless they chose to repudiate the risk within a month from that time.

Judgment.

The renewal receipts seem to be valueless. There was no new insurance in fact effected, no further premium paid, and no deduction for the risk run during the currency of the earlier receipts; while each purports to insure for a year from its date. If such a course of proceeding were within the power of the agent, a person might, by payment of one premium, continue insured for a series of years. In this case, I attribute no misconduct to the plaintiff, but if the last receipt in July were similar to the previous ones, the company would have insured him for a year and five months for one premium. The plaintiff seems to have taken the receipts without paying much attention to them.

I think, however, that an insurance by means of the interim receipt must be regarded as made upon the terms of the ordinary policies of the company. The

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receipt says it is to be subject to the conditions expressed in the application as to the provisions of the policy when issued. The conditions in the application and in the policy are the same, and the proposal at the bottom of the application is for an insurance subject to the conditions indorsed on it. Without any such stipulation it has been held in the American Courts that the insurance, by means of such receipt, must be subject to the ordinary conditions upon a policy—*Eureka Insurance Co.* v. *Robinson* (*a*),—and it is proper that it should be so on plain principles of justice. It would be unreasonable to hold that by giving such a receipt the company meant to insure a larger liability than they were subject to on a policy; they must be understood as contracting for an insurance of the ordinary kind. The plaintiff asks for the completion of the contract by the issuing of a policy, and he does not pretend that he is entitled to any other than the ordinary policy: he cannot therefore be in any better condition than if he had the policy in his possession.

Judgment.

The language of the conditions was said to be only applicable to a policy actually issued. Thus by-law 16 says that certain circumstances *will vitiate the policy* unless notice be given, the consent of the board obtained and indorsed on the policy, and signed by the President and Secretary. I think that *policy* here means *insurance* or some equivalent, and that the plaintiff is not exonerated from giving the notice, because there may be no policy on which to indorse it. It might be indorsed on the receipt, which the plaintiff claims is equivalent to a policy.

One of the circumstances which by-law 16 declares shall vitiate the policy unless notified in writing to the Secretary, consented to by the board, and indorsed, is

(*a*) 56 Pa. St. 256.

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"Second. Of alienating by mortgage or otherwise, or any change in title or ownership of property insured in this company."

The plaintiff mortgaged the property to the Trust and Loan Company on the 28th March, 1874, and gave no notice in writing to the Secretary, as required by the 16th by-law. He did verbally notify the agent, who was well aware of the transaction. But the condition stipulates that the notice shall be *in writing*, and given to the *Secretary*, not to the agent. I see nothing unjust or inequitable in such an agreement, and if the plaintiff chose to take an insurance subject to it, he must shew that he complied with it. In some of the American cases—such as *Sexton* v. *The Montgomery Co. Mutual Insurance Co.* (*a*), and *McEwen* v. *The Same Co.* (*b*)—notice to the agent verbally was held sufficient, but there was no condition that the notice should be in writing, and the cases were rested upon that ground. I say nothing as to what the conclusion should be if the notice were traced home to the company, though not in writing. But here the terms of the by-law shew that the agent was not appointed to receive such notices, and it is not established that the notice ever reached the company.

Judgment.

The defendants also contend that the statement of the plaintiff is erroneous, that the sum insured is not more than two-thirds of the value of the property, exclusive of land, and inclusive of all other insurances on the same. As the original application has not been produced; as the plaintiff swears the value was otherwise stated by him; and it has been proved the property was worth the $15,000, I do not think I ought to find such statement to have been made. It is not an over valuation to the prejudice of the company, and had it in fact been mis-

(*a*) 9 Barbour 191. (*b*) 5 Hill 101.

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stated by undervaluing the property, the plaintiff should at least be allowed to shew the true value.

The defendants further object that proof of the loss was not given within thirty days, and that this is fatal to the claim. By-law 46 provides that a detailed account of the loss, verified by oath, is to be given to the company; and if there be any misrepresentation, fraud, or false swearing, the claimant shall forfeit all claim by virtue of his policy. The statute 36 Vic. ch. 44, sec. 52 O., requires proof to be given within thirty days. Here the plaintiff did not give any proof of loss to the company, verified by oath, till after the thirty days had elapsed. The plaintiff contends that the by-law only makes the policy void if there be misrepresentation, fraud, &c., but not from mere delay. If a case were made that the proofs were not furnished by reason of accident or mistake, it is possible that relief might be afforded; but where the only reason assigned is a belief that it was unnecessary, contrary to the express language of the by-law, or that it would be prepared by the agent, who did not do so, I think I must hold that the condition has not been complied with, and that the last clause of the by-law cannot be read as meaning that proof of loss might be furnished at any time.

Judgment.

The plaintiff claims, at all events, to be entitled to a return of the premium. He can only be entitled to that if the risk was never run. If once begun the premium is not divisible, and there will be no return. *Bunyon's* Law of Fire Insurance, 85; *Tyrie* v. *Fletcher* (*a*), *Mulvey* v. *The Gore District Fire Assurance Co.* (*b*), *Bleakley* v. *Niagara District Mutual Insurance Co.* (*c*). But as I have held that the risk did begin and has only been avoided by the neglect of the assured, I cannot give the plaintiff this relief.

(*a*) Cowp. 666. (*b*) 25 U. C. B. R. 424. (*c*) 16 Gr. 198.

The bill is dismissed, but as the defendants have failed to substantiate some of their defences it will be without costs.

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Fire insurance—Compromise—Fraud—Costs.

Where an insurance company chooses, rather than litigate the question of their liability to the assured, to compromise his claim, they cannot afterwards impeach the settlement, although they may be able to shew they have been imposed upon; and where the money paid upon such a compromise had been, by the agent who effected the arrangement with the company, paid over to a bank to whom the claim had been assigned, who thereupon gave up certain notes held by the bank, the Court refused to open up the settlement which had been made, although the evidence distinctly shewed that a gross fraud had been perpetrated upon the company: that the fire by which the alleged loss was said to have been sustained, was caused by the parties concerned, and that in fact the goods, the loss of which was claimed for, never were destroyed.

Where, in obtaining the settlement of a pretended claim against an insurance company, the agent employed to effect the arrangement had been guilty of very improper conduct, which, however, had not had the effect of producing the compromise, the Court, although compelled to dismiss the bill, refused him his costs of a suit brought to set aside the settlement, and to which such agent had been made a defendant.

Statement.

This was a suit by the plaintiffs to recover back from the defendants a sum of $3,225, paid by the plaintiffs upon a policy of insurance against fire effected by "The Strathroy Woollen Manufacturing Company," upon a quantity of wool alleged to have been stored in a frame building used by the company as a store house. The evidence shewed that a large quantity of wool had been stored in this house, but at the same time demonstrated very plainly that almost all had been removed shortly before the fire, and on or before the 23rd of July, 1873. A teamster, engaged to remove it, gave evidence that he had been employed to do so, and that he had taken it to

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the railway station for the purpose of being sent away. The evidence further shewed that early in the morning of the 24th, this storehouse was discovered to be on fire, and was consumed. The only traces of wool remaining in the ruins of the building were one bale, which was somewhat scorched, and a small pile of loose wool, which was also partially burnt ; in short it was quite evident that very little, if any, wool had been left in the building when the fire occurred.

Immediately after the fire occurred the usual claim papers were sent in to the office of the plaintiffs, verified by the oaths of the defendants *Robb* and *Dewan*, the former being the chief manager, the latter the president of the Woollen Company ; but the latter it was shewn knew very little, if anything, about the affairs of the Company, and based his statements solely on the information given to him by *Robb* and by the defendant *Wilkinson*, who had also been active in the management of the factory. The defendant *Johnston* was employed by the company, and *The Molson's Bank*, to whom the policies had been assigned as security for a note of the company indorsed by some of the shareholders, to obtain payment, from the several Insurance Companies, of the amounts insured. It appeared that an insurance had been effected with the Western, the Standard, and also the Provincial Insurance Companies. The settlements effected with these several companies are stated in the judgment.

Statement.

After the settlement had been made by the plaintiffs and the money paid, evidence was adduced in another proceeding in this Court, shewing that a gross fraud had been practised upon the companies, and criminal proceedings were instituted against some of the parties concerned, but *Robb* and *Wilkinson* both left the country before process could be served upon them. Thereupon the present suit was brought.

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The other facts appear in the judgment.

The cause came on for the examination of witnesses and hearing at the sittings in Toronto.

Mr. *Attorney General Blake* and Mr. *Boyd*, for the plaintiffs.

No one listening to the evidence in this case can have failed to be fully impressed with the glaring fraud that has been perpetrated on these plaintiffs, notwithstanding the attempt made by the defendants to shew that no fraud existed. First, there was a grievous fraud by the managing members of the company, for even admitting that all the wool claimed for had ever been deposited in the premises which were destroyed, the evidence places it beyond doubt that there was a subsequent dishonest abstraction of it.

Argument.

If, however, the present defendants can by law be relieved from the consequences of the fraud of their agents on that occasion, then, the conduct of *Johnston*, who was agent for all of them, in obtaining from the present plaintiffs by means of a pretended settlement with the Provincial and other offices the settlement now impeached, rendered them answerable for his conduct. *The Molson's Bank* ought also to be held bound by the frauds thus perpetrated, as without such fraudulent practices the money could not have been obtained from the plaintiffs.

Mr. *Attorney-General Mowat*, Mr. *Fitzgerald*, Q. C., Mr. *Meredith*, and Mr. *Moss*, for the defendants, other than *Wilkinson* and *Robb*, against whom the bill was taken *pro confesso*.

In order to defeat the right of the plaintiffs to recover here, it is only necessary to meet the case made against

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Johnston, he being admittedly, the agent of the parties interested. As to him, however, it is shewn that all he did was simply to receive the money from the respective Insurance Companies and hand it over to the parties employing him. Both the principals here were innocent. True it is that *Robb* wronged the Insurance Companies, but it is equally true that he grievously wronged the Woollen Company of which he was the most active director; for the wool, if removed in the manner suggested, was removed as well in fraud of the Woollen Company as of the Insurance Companies; so that he would not communicate that fact to the company. And now, when this litigation is going on, the really guilty parties have escaped beyond the jurisdiction of the Court.

Argument.

There is no distinction between companies and private parties in cases of this sort. Here the Insurance Company chose to settle the claim presented by *Johnston* upon a consideration being paid them for waiving their right to investigate the matter; the manager of the plaintiffs' company was not influenced by seeing that the other Insurance Companies had settled at certain rates, as before seeing the evidence of such settlement he had offered to pay the sum which *Johnston* ultimately accepted.

It is sought now to compel Molson's Bank to refund the money in the event of the plaintiffs failing to obtain it from the other defendants; but then it is submitted it is relief to which the plaintiffs are not entitled, as the fact of the money having reached the bank as a creditor of the company was accidental, it might have been distributed amongst hundreds of creditors of the company, and, had it been, it could not be contended for a moment that the plaintiffs would have been entitled to call upon all to refund.

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Amongst the authorities cited were *Bramston* v. *Robins* (*a*), *Bromley* v. *Holland* (*b*), *Kelly* v. *Solari* (*c*), *Stapilton* v. *Stapilton* (*d*), *Attwood* v. ———— (*e*), *Barlow* v. *The Ocean Insurance Co.* (*f*), *Cook* v. *Wright* (*g*), *Ranger* v. *The Great Western Railway Co.* (*h*), *MacKay* v. *The Colonial Bank of New Brunswick* (*i*), *Townsend* v. *Crowdy* (*j*), *Kerr* on Frauds, 36, 79.

BLAKE, V. C.—The bill is *pro confesso* against the defendants *Wilkinson* and *Robb*, who thereby admit that they removed the wool and burned the warehouse. As against them the plaintiffs are therefore entitled to a decree for payment of the amount paid by the Insurance Company for insurance money, $3,225 and interest, and the costs of the suit.

Judgment.

The question is, whether the other defendants are also liable to make good this sum? There is no doubt that at the time of the fire there was but little wool in the warehouse, and there is much to lead to the conclusion that the building was purposely set on fire by those interested in obtaining payment of the insurance money. *Wilkinson* and *Robb* really managed the factory. The defendant *Dewan*, the president, knew, personally, but little about the details of the concern. I have perused the evidence several times, but do not find that any fraud in the transaction can be traced to any of the defendants, excepting *Wilkinson, Robb*, and *Johnston;* and as to the latter, only in respect of his dealing with the managers of the Provincial Insurance Company, and with the plaintiffs, when procuring settlements of the claims against them. The defendants *Robb* and *Dewan*

(*a*) 4 Bing. 11.
(*b*) 7 Ves. 3.
(*c*) 9 M. & W. 54.
(*d*) 2 W. & T. 824.
(*e*) 1 Russ. 353.
(*f*) 4 Met. 270.
(*g*) 1 B. & S. 559.
(*h*) 6 B. L. 66.
(*i*) 22 W. R. 473.
(*j*) 8 C. B. N. S. 477.

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attest by their oaths the truth of the statements made in the claim papers put in by the company to the plaintiffs. The defendant *Johnston*, as agent of all the parties interested in the sums to be received under the various policies, proceeded to Toronto, where the head offices of the plaintiffs, the Western and the Provincial Insurance Companies are. On calling on Mr. *Ball*, the manager of the plaintiffs, Mr. *Johnston* demanded $4000, the amount covered by the policy in this company. In answer to this request, Mr. *Ball* stated that the companies were only going to give eighty cents on the dollar, and that he did not think the quantity of wool claimed was destroyed, and they then parted. Mr. *Johnston* returned to the Provincial and Western, and settled with them at ninety-five cents in the dollar each, and returned to Mr. *Ball* and shewed him the cheques, who still declined to arrange the claim until he saw his Board. Mr. *Ball* was annoyed that these companies had settled. Mr. *Johnston* returned home, and again came

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to Toronto in a week or ten days, but failed to see Mr. *Ball*. He came back a third time and asked for a settlement, and Mr. *Ball* offered eighty cents, and then said had he not made the offer, from some facts that had come to his knowledge since the first meeting, he would have resisted the claim. *Johnston* states that he thought he was "bluffing" him, and demanded $3800, which *Ball* refused to give; and he also refused to allow him to see the Board, whereupon *Johnston* agreed to accept, and did accept the $3200, with $25 added for the expenses of his third visit to effect this arrangement.

The fire took place on the 24th of July, 1873, and the settlement with the plaintiffs was not carried out until the December following. In the meantime the inspector of the plaintiffs had been making on the spot all inquiries in his power as to the origin of the fire, and the quantity of wool destroyed. On both these points he was suspicious. The report he made to Mr. *Ball* shews

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that as to these two questions he was pushing his investigations and on the 20th of September he writes him: "No stone should be left unturned to defeat what I am sure is a fraud," which shews the conclusion at which he had arrived, from the evidence he had then collected in Strathroy on the subject. No doubt it was because of the feeling that the claim made was an unjust one that the plaintiffs only offered $3200 in satisfaction of it. The case would have assumed a very different aspect if, on the demand of *Johnston*, the plaintiffs had paid the $4000 claimed without investigation; or if they had absolutely refused to make any payment until the cheques received by *Johnston* were produced to them. But this is not the course here pursued. The plaintiffs are told that *Dewan*, the president of the woollen company, has no personal knowledge of the facts set forth in the claim papers—that he acts, as does the company, on the information with which he is supplied. No personal fraud can be traced to him. He uses the information with which he is supplied, and thereby endeavours to enforce the claim which he conceives to be a just one against the plaintiffs. The plaintiffs oppose them by counter statements. They think their position in resisting the demand made is so strong that they refuse to pay the $4000, but offer, to avoid litigation, or further investigation, eighty cents on the dollar, which is accepted. The language of Lord *Abinger*, in *Kelly* v. *Solari* (*a*), seems applicable to such a case: "There may also be cases in which, although he might, by investigation, learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding. In that case there can be no doubt that he is equally bound." And in the same case *Rolfe*, B., says: "But I agree that Mr. *Platt* has a right to go to the jury again, upon two grounds: first, that the jury may possibly find that the directors had not in truth forgotten the

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(*a*) 9 M. & W. 54.

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fact; and secondly, they may also come to the conclusion that they had determined that they would not expose the office to unpopularity, and would therefore pay the money at all events, in which case I quite agree that they could not recover it back."

In *Cook* v. *Wright (a)* the judgment of the Court was delivered by Mr. Justice *Blackburn*: it bears upon both of the points mainly argued in the present case: "We agree that unless there was a reasonable claim on the one side, which it was *bonâ fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise. The position of the parties must necessarily be altered in every case of compromise, so that, if the question is afterwards opened up, they cannot be replaced as they were before the compromise. The plaintiff may be in a less favourable position for renewing his litigation; he must be at additional trouble and expense in again getting up his case, and he may no longer be able to produce the evidence which could have proved it originally. Besides, though he may not, in point of law, be bound to refrain from enforcing his rights against third persons during the continuance of the compromise to which they are not parties, yet, practically, the effect of the compromise must be to prevent his doing so. For instance, in the present case, there can be no doubt that the practical effect of the compromise must have been to induce the commissioners to refrain from taking proceedings against Mrs. *Bennett* the real owner of the houses, while the notes given by the defendant, her agent, were running, though the compromise might have afforded no ground of defence had such proceedings been resorted to. It is this detriment to the party consenting to a compromise arising from

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(a) 1 B. & S. 559-569.

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the necessary alteration in his position which, in our opinion, forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra costs of litigation. The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the *bona fides* of the compromise."

In this case *The Molson's Bank*, to which institution the loss was made payable, accepted the sum paid by the insurance company, and gave up the note which it held as collateral security for the amount covered by the policy. The woollen company has meantime failed, and made an assignment, and the assets have been divided, and no claim has been made in respect of this debt, which was taken to have been paid by the amounts received from the insurance company. One of the makers of this note has also, in the meantime, failed, and made an assignment, and his estate has been divided, so that it is impossible now to place the parties back in the position they occupied before the compromise was made. I think, in the present case, that the insurance company, after due deliberation, and without depending on the statements made by the defendant, after an independent investigation, made by its own servants, chose to enter into a compromise of a claim which the company was, in good faith, pressing; that the insurance company thought it would be better, under all the circumstances, and in view of the probable effect on their business, and of the chance of being made liable for payment in full, to settle for the $3,200—that the company intended to, and did then waive further inquiry into the facts—that there has been a serious alteration in the position of the defendants, which would cause them great detriment if the compromise were disturbed, and that it is not now in the power of the plaintiffs to reinstate the parties in their old position. It is impossible to lay down any general rule as to what will invalidate a compromise,

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or what is reasonable diligence in attacking a transaction, or what acts will preclude a party from being relieved from a settlement made; but I am of opinion that the acts of the company and of the defendants in the present case are such as to prevent the plaintiffs from now obtaining the full relief for which they ask.

There was a further ground on which the plaintiffs sought relief against the defendants, which I have not yet discussed The defendant *Johnston*, as the agent of the bank, the woollen company, the directors and the shareholders, made the settlement with the insurance company. On the examination of *Johnston* he, after much hesitation, made the following admission: "I think I told Mr. *Murray* (W. H.) I had spent $100. I had given it to Mr. *Harvey* to make this settlement. This was the first time I had seen him. I got a cheque for $3,800, and gave back a cheque for $100. I did this because I wanted to shew that I had made a settlement with the Provincial. I have no doubt I told this to Mr. *Harvey*,—that he agreed to this. I settled with Mr. *Marr* for 60 cents. He gave me a cheque for 80 cents, and I gave him back a cheque for 20 cents. This was a suggestion of Mr. *Marr*. I don't know why. Molson's Bank gave me back a cheque for this 20 cents. I represented to Mr. *Ball* that I had gotten these two cheques, and he settled with me."

Judgment.

Johnston made this disclosure so damaging to himself and those engaged with him in the scheme most unwillingly. He was the only witness examined on the point, and I must therefore take it for granted that Messrs. *Johnston* and *Harvey* arranged that a cheque for the larger amount was to be given, in order thereby to induce the plaintiffs to settle with the defendants for the full amount, or at all events for $3800. As a matter of fact Mr. *Ball* was not swayed by these representations. Before these cheques were shewn to him he

stated eighty cents in the dollar was the rate at which they were prepared to settle, and he carried out his determination, unaffected by the fact that the defendants had obtained from others a larger amount than his company was paying. Nothing can be said to paliate such dishonest means as are here disclosed for endeavouring to effect a settlement; but I do not find that the plaintiffs were thereby influenced in altering their original proposal, or in offering more than otherwise they would have done; and as they closed on the terms offered before the Provincial Insurance Company cheque was shewn to them, I do not think I can hold, at this late day, this improper act of Messrs. *Johnston* and *Harvey* a sufficient ground for setting aside the transaction impeached. But while I so hold, yet it would not be proper that this fact should be overlooked, nor would it be according to the practice of this Court not to take it into consideration in dealing with the costs of the litigation. Mr. *Johnston* has, by his conduct in obtaining the settlement of the claim which is impeached, deprived himself of the right which otherwise he would have had to his costs of suit; and those who employed Mr. *Johnston* as their agent, and take advantage of this act, by retaining the money he has procured for them, can stand in this respect in no better position than he does. It is the least measure of relief the Court can mete out, where, in place of the good faith which should be displayed, men descend to questionable means of obtaining what they desire. The decree will be against *Robb* and *Wilkinson*, with costs. No costs as to the other defendants, nor decree against them.

Judgment.

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Re Robbins.

Executors—Evidence Act—Compromising claim—Corroborative evidence.

Where a claim is made against the estate of a testater, and the executors in the *bona fide* discharge of their duty compromise the claim, it is not necessary on passing the accounts of the executors that any corroborative evidence should be adduced.

This was an administration suit. In proceeding in the Master's office at Brantford, a charge was made in the accounts of the executors of $250 paid to one *Millard*, who had claimed to be a creditor of the testator to an amount exceeding $1,000. It appeared that *Millard* had presented an account to the executors for the latter sum, which they declined to pay; and after some negotiations and several attempts at a settlement, the executors agreed to pay this creditor $250 in full of this demand against the estate, and which he accepted. In passing the executors' accounts *Millard* was the only witness to prove the claim, which was alleged to be for money lent, and the Master disallowed the amount to the executors, adding to his conclusions from the evidence an additional reason for so doing, that "sufficient corroborative evidence to support it should be given under the statute, as there is no admission by the testator's books nor in any writing of his; and the legatees, who are interested and should have been consulted, repudiated the claim."

Statement.

The executors appealed from this, amongst other findings of the Master.

Mr. *Wilson* and Mr. *Cassels*, for the appeal.

Mr. *W. H. Kerr* and Mr. *George Kerr*, contra.

Judgment.

Blake, V. C., said he thought the Master should not have found that the claim could not be allowed because

there was not corroborative evidence, as in his opinion the act did not apply to such a case. He did not find his report wrong, and he did not actually dissent from his finding on the question ; but the reason given would in effect prevent any executor compromising a claim made against the estate, which he was clear they had a right to do under the Act as to executors, and therefore sent the matter back for the purpose of enabling the Master to reconsider his finding on this point.

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Bleeker v. White.

Will, construction of—Legacies, specific or demonstrative—Abatement of legacies.

A testator out of the proceeds of his real and personal estate gave to one son $200, to another $100, and to the third $1,800, the balance to be equally divided between his daughters, six in number, naming them. By a codicil he revoked the bequest to the second named son of $100 and gave an additional sum of $100 to the first named son. The household furniture to be equally divided between his two daughters last named in the will.

Held, that these legacies were specific and not merely demonstrative and if the fund was insufficient to pay them all, they must abate proportionally.

Statement.

This was a suit for the administration of the estate of *Stephen White* deceased, who, by his will, dated the 4th of September, 1873, directed as follows :

"1. I hereby constitute and appoint *William Dafoe*, *John Bleeker*, and *John O. Sharpe*, to be my sole executors of this my last will ; directing my said executors to sell the north half of my farm, lot 23, in the fourth concession of the township of Sidney, and give a deed for the land ; and also my personal property excepting my household furniture, and to collect all obligations due me, and after paying all my debts and funeral expenses ; and I also set apart a sum not to exceed seventy-

1876. five dollars for monuments for myself and my wife *Maria* and my sons *Kellar* and *Wilber White*; the balance shall be divided as hereinafter provided.

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"2. I give to my son *Reuben White* two hundred dollars; to my son *Henry White* one hundred dollars; to my son *Franklin White*, eighteen hundred dollars, to be placed at interest for his sole benefit till he becomes twenty-one years of age; the balance to be equally divided between my daughters *Fanny Ann Dafoe*, *Esther Bleeker*, *Louisa Sharpe*, *Ada Ketcheson*, *Clarissa White*, and *Sabra White*. The household furniture to be equally divided between the last two named persons, excepting the organ, which is to be given to my daughter *Sabra White*.

"3. The amount that will be due my daughter *Sabra White* shall be placed at interest for her sole benefit till she marries or becomes of age, then it shall be given to her."

Statement.

On the 31st October, 1873, the testator executed a codicil thereto in the following words: "This is a codicil to the last will and testament of *Stephen White*, of the township of Sidney, county of Hastings and province of Ontario, bearing date the 4th day of September in the year of our Lord one thousand eight hundred and seventy-three. I do hereby revoke the bequest of the sum of one hundred dollars to my son *Henry White*, and do give and bequeath the same to my son *Reuben White*; also, further I do give and bequeath unto my son *Ruben White* further the sum of one hundred dollars more to be paid unto him out of the proceeds of the real estate bequeathed by me.

And unto my son *Henry White* I now in sound mind do will and bequeath the sum of five shillings currency."

1876.

Bleeker v. White.

The usual administration order had been obtained and accounts taken before the Master, and the cause came on for further directions.

Mr. *Crickmore*, for the plaintiff.

Mr. *Dickson*, for the infant defendants.

Mr. *Gordon*, for the other defendants.

PROUDFOOT, V. C.—The legacies are, I considered, specific, and not merely demonstrative. There is nothing in the will from which I can gather that the testator wished them to be paid at all events. They are only given in connection with the devise of land and personalty out of which they were to be paid; and if the specified fund is not sufficient to pay them all they must abate proportionally: *Page* v. *Leapingwell* (*a*), *Williams* v. *Hughes* (*b*), *Dickin* v. *Edwards* (*c*). January 21. Judgment.

The costs not provided for by the decree will be borne ratably by the devised property and that of which there was an intestacy, in proportion to their value: *Eyre* v. *Marsden* (*d*), *Bunnett* v. *Foster* (*e*), *Maddison* v. *Pye* (*f*), *Bagot* v. *Legge* (*g*).

The outstanding personalty, consisting of a mortgage and two notes made by *Reuben White*, on which there is now due $308.52, may be set off against his legacy, unless the abatement should reduce his legacy below that sum, when he must pay the difference into Court.

The legacy to *Henry White* (five shillings) and his share of the south half of the lot, may be paid to *Lewis*

(*a*) 18 Ves. 463. (*b*) 24 Beav. 474.
(*c*) 4 Hare 273. (*d*) 4 M. & C. 231.
(*e*) 2 Phill. 161, 7 Beav. 540. (*f*) 32 Beav. 658.
(*g*) 2 Dr. & Sm. 259.

1876. *Wallbridge*, Esq., on his undertaking to pay to *Henry White*.

Bleeker v. White.

The rents received or accrued since testator's death are not personal estate, and there must be an inquiry how much of them were produced by the north, and how much by the south half of the lot; and any outstanding collected and divided among those entitled to the proceeds of these respective parcels.

The legacies to be paid to the adult legatees, and the proceeds of the south half paid to those found entitled by the Master's report.

The legacies and share of south half payable to the infants to be paid into Court, and invested for their benefit.

1876.

Eccles v. Lowry.

Personal representative—Heir-at-law—Evidence—Practice.

Where an action is brought against the personal representative of a testator or intestate, the estate, as an estate, is bound by the result of the action brought, just as the deceased would have been bound if in his lifetime it had been prosecuted against himself; and the judgment stands at law as conclusive against all the property of the deceased, whether it be ultimately realized out of the goods or lands; as against the heirs, however, it is only *primâ facie* evidence.

Where, therefore, in an action at law upon the covenant of the intestate against his administrator, judgment had been entered in favour of the plaintiff, who subsequently proceeded in this Court to realize his judgment, the Court *held* that it was not necessary for him to give any evidence as to the consideration upon which the judgment was founded; and the defendants, the heirs-at-law, having refrained from calling witnesses to impeach the judgment, resting on their objection that the plaintiff was bound to give evidence of the *bona fides* of the judgment, in consequence of which a decree was pronounced against them, the Court on rehearing ordered a new hearing to take place with a view to affording the defendants an opportunity of disputing the validity of the judgment, upon payment by them of the costs of the hearing and rehearing.

Statement.

The question involved in this suit was whether a judgment recovered at law upon a covenant for quiet enjoyment until default, contained in a mortgage alleged to have been made by the plaintiff to the intestate, and the issue in that action having been whether such covenant in the mortgage was the deed of the intestate, is binding against the heirs-at-law in a subsequent suit for redemption, in which the conveyance to the plaintiff by the intestate and the execution of the mortgage by the latter as mortgagee were denied.

The cause came on for hearing at the sittings of the Court at Ottawa.

Mr. *Bethune* and Mr. *Crysler*, for the plaintiff.

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Mr. *Maclennan*, Q. C., Mr. *Lees*, and Mr. *Hogg*, for the defendants.

Counsel for the plaintiff contended that the judgment, so long as it stood of record, was an estoppel against the heirs; while counsel for the defendants, the heirs-at-law, contended that it was not even evidence against them, and declined to call evidence impeaching the judgment.

BLAKE, V. C., thereupon pronounced the usual decree for redemption, with a reference to the Master at Ottawa to take accounts, &c.

The defendants thereupon reheard the cause.

Mr. *Bethune*, for the plaintiff.

Mr. *Maclennan*, Q. C., for defendants.

The cases principally relied on are mentioned in the judgment.

Judgment.

BLAKE, V. C.—In this country a personal representative, whether executor or administrator, represents the estate of the deceased, so that on a judgment recovered against him, in his representative capacity, both the personalty and realty of the estate represented can be, on such judgment, disposed of for its satisfaction. Where the deceased has not, in his life time, satisfied a covenant he has made, and proceedings are taken for its enforcement, the law has prescribed the person who is, for the estate, to answer the demand made upon it. It is not that such person represents a particular class or portion of the estate, or particular claimants upon it, but the estate that the deceased left, whether personalty or realty, is liable to seizure under such judgment, and the heirs, next of kin and beneficiaries are, at law, bound by such proceedings. The estate, as an estate,

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is bound by the result of the action brought, just as the deceased would have been bound if, in his life time, it had been prosecuted against himself. It is not material, whether or not it is necessary, to pursue the realty in the former any more than in the latter case. The binding nature of the judgment does not depend upon whether or not it is necessary to resort to the realty. The judgment stands at law as conclusive against all the property of the deceased whether or not it may ultimately be realized out of the goods or lands.

In the present case the plaintiff commenced proceedings at law on the covenant for quiet enjoyment in a mortgage said to have been made by the plaintiff to the father of the defendants, and which was alleged to have been executed by him. To this the personal representative, who was also one of the heirs at law, pleaded *non est factum*, and that the deceased was of unsound mind when his name was appended to the paper in question. The case was defended, and the issues raised found in favour of the plaintiff. On this judgment the plaintiff was at liberty to pursue the property of the deceased whether real or personal—the estate was concluded by it. This finding that the instrument in question was the deed of the ancestor, bound the heirs and next of kin of the intestate, and the property which would otherwise have gone to them became subject to the realization thereout of this claim. The same plaintiff is now seeking, by bill in this Court, to redeem this mortgage which has, in the manner above described, been established against the estate of the deceased. The defendants, the real representatives, raise in their answer the same questions which were disposed of in the action at law, and maintain that the finding at law should be, for all purposes, disregarded, and that the plaintiff is put to the establishment of his case against them, irrespective of the former action. I do not think it reasonable that the

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plaintiff should be placed in this position. I think some weight must be given to the fact that this mortgage has already been established against this same estate; and I am of opinion that the proper rule to lay down is that while such a judgment is, in the absence of fraud or mistake, conclusive against the personal representative and the personalty, it is *primâ facie* evidence against the heirs at law. See *Lovell* v. *Gibson* (*a*); *Willis* v. *Willis* (*b*); *Harvey* v. *Wilde* (*c*); *Steele* v. *Lineberger* (*d*); *Story* v. *Fry* (*e*). I think on the production of the judgment roll in the action referred to, a *primâ facie* case was made out in favour of the plaintiff, which threw the onus on the defendants, and, as they tendered no evidence to displace this case, the plaintiff was entitled to succeed. The defendants, however, asked if the Court were in favour of the plaintiff's contention that an opportunity should be given them to adduce evidence. Under the circumstances I do not think this unreasonable, on payment of the costs of the former hearing, and of the rehearing. These costs to be paid in a month, and the case to be set down by the defendants for the next sittings at Ottawa. In default of payment of these costs and of setting down the case within the time specified, the decree made is to stand.

Judgment.

PROUDFOOT, V. C.—The question discussed on the rehearing was, whether a judgment recovered at law upon a covenant against the administrator of an intestate is *primâ facie* evidence against the heirs at law, of whom the administrator was one.

The point was expressly decided in *Lovell* v. *Gibson* (*f*), in the affirmative, by *Mowat*, V. C., but in the subsequent case of *Willis* v. *Willis* (*g*), *Strong*, V. C.,

(*a*) 19 Gr. 280.
(*b*) 19 Gr. 573.
(*c*) L. R. 14 Eq. 438.
(*d*) 59 Penn. State Rep. 308.
(*e*) 1 Y. & C. C. 603.
(*f*) 19 Grant 280.
(*g*) 19 Grant 573.

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while following *Lovell* v. *Gibson*, expressed his dissatisfaction with it; and that were it *res integra* he would have held the contrary. *Mowat*, V. C., rested his decision on the effect of the 27 Vic., ch. 15, by which, after reciting the decisions of the Courts in Upper Canada that, under the Imperial Statute, 5 Geo. II. ch. 7, the title of a testator or intestate in real estate might be seized and sold under a judgment and execution against the personal representative, and that it was desirable to quiet the titles acquired under such sales, it was enacted, in effect, that the previous decisions of the Court were correct, and that the same course might be pursued in the future.

The reason for this statute is stated in *Willis* v. *Willis*, and I agree with *Strong*, V. C., in his remark that the former practice of the Court was in no way affected by it, and if *Lovell* v. *Gibson* was not correctly decided upon the law as it stood before that Act, it receives no authority from it. I think it is also correctly said that in England the judgment against the personal representative would not be an estoppel, perhaps not even *primâ facie* evidence against the heir (*a*), notwithstanding what is said in *Harvey* v. *Wilde* (*b*).

Judgment.

But the 5 Geo. II., ch. 7, is not in force in England, and there has never been any means there of reaching the lands through a judgment against the personal representative. But when the English Courts have been called upon to construe the 5 Geo. II. or similar statute, we find an entirely different class of decisions. Thus in *Thompson* v. *Grant* (*c*), Sir *Thomas Plumer* held that an executor under that statute might retain his debt out of the proceeds of real estate in the same manner as out of personalty. And in *Story* v. *Fry* (*d*), *Knight Bruce*, V. C., held that in a suit for the administration of real

(*a*) *Wilson* v. *Leonard*, 3 Beav. 373.
(*b*) L. R. 14, Eq. 438.
(*c*) 1 Russ. 540, *n.*
(*d*) 1 Y. & C. C. C. 603.

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estate in India it was not necessary or proper to make the heir at law a party. The same Judge, eleven years later, in *Turner* v. *Cox* (*a*), delivered the judgment of the Privy Council, deciding that the statute made lands legal assets, and that it was not competent to a testator to disappoint the rule of law in that respect. *Bullen* v. *A'Beckett* (*b*), seems to contradict this course of decision, and certainly indicates that 5 Geo. II., ch. 7, is capable of another construction, and that lands could not be reached through a judgment against an executor. But Sir *John Coleridge,* who delivered the judgment of the Privy Council, admits that an established course of practice or some conclusive authority would warrant a construction different from what the Court there determined.

Here we have had an established course of practice that lands always have been, and always may be, rightfully sold under a judgment against the personal representative.

Judgment.

The executor represents the estate of the deceased. It is his duty to protect it from demands that may be made upon it, and when judgment is recovered against him the lands may be sold under it. It is true the estate descends to the heir or devisee. The judgment is, as against the estate, conclusive evidence of the existence of the debt ; and it might well have been held conclusive against all the persons whose property might be reached under that judgment, whether next of kin or heirs at law. And it is so at law. In this Court, however, our general order 472, which only expresses what had before been the practice, requires notice to be given to the heirs and devisees, or one or more of them, before accounts or inquiries are directed in regard to real estate. This does not expressly declare the effect

(*a*) 8 Moo. P. C. 288. (*b*) 1 Moo., P. C., N. S., 223.

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to be given to accounts taken in their absence, but it does not declare they shall have no effect, and it only requires notice to be given to *one* or *more* of them. Here the administrator is one of the heirs at law, and even according to a rigid construction of the order it has been complied with.

No injustice has been done to the heirs by ascribing to the judgment the limited effect of being only *primâ facie* evidence. They have the means of investigating its accuracy. They are generally the same persons, under the abolition of primogeniture Act, as the next of kin; and in the latter character they are clearly bound by it. If as to part of their property, the personal estate, they cannot impeach it because they were not parties, is there any reason for holding it to be entirely worthless when it is sought to render another part of their property, the realty, answerable ?

Judgment.

In the United States, where, I believe, the principle of the 5 Geo. II., ch. 7, is generally applied, the judgment against the personal representative has been held *primâ facie* evidence against the heirs. It is considered as the foundation of the proceeding against the lands, and as conclusively establishing the existence of the debt against all the property vested in the executor ; but as *primâ facie* evidence only when necessary to proceed against the lands: *Steele* v. *Lineberger* (*a*).

I think the appeal should be dismissed, and with costs.

The defendants ask that a new hearing may be permitted in case our opinion is adverse to them, and under the circumstances of this case, I think it reasonable to give them that.

SPRAGGE, C., concurred.

(*a*) 59 Penn. 308.

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Black v. Fountain.

Fraudulent conveyance—Fraud on creditors—Husband and wife.

A trader in insolvent circumstances, for the purpose, avowedly, of inducing his wife to release her dower in a property shewn to have been worth about $1,300, conveyed to her a farm, the net value of which was about $1,700.

Held, that this was a fraud upon creditors; and the Court set aside the transaction with costs.

Statement.

This was a bill by *Harry Black*, the assignee in insolvency of *Edward Fountain*, against the insolvent, and *Catherine Fountain*, his wife, seeking to set aside a conveyance of one hundred acres of land in the township of Raleigh, made to her under the following circumstances. In November, 1871, the insolvent was in insolvent circumstances and on the 22nd of that month made an assignment to one *Henry* for the benefit of his creditors. On the 13th March, 1872, an arrangement was made through *Lowe & Smith*, themselves creditors, whereby the insolvent was enabled practically to carry on the business; *Lowe & Smith* paying a composition of sixty-five cents in the dollar to other creditors out of moneys to be paid by *Fountain*, the insolvent, out of the business, and they standing creditors of *Fountain* for a certain amount.

Among the property assigned were two parcels of real estate. One a town lot in Chatham, which was subject to a mortgage of $700; the other a farm of 100 acres in Raleigh, and was subject to a mortgage for $300. To both of these mortgages *Fountain's* wife was a party for the purpose of barring dower. In the agreement of the 13th March it was stipulated that *Lowe & Smith* should have "a bar of dower" in the lands assigned to *Henry*, by which was evidently meant that the dower should be barred absolutely by Mrs. *Fountain*; to this, however, she objected.

In July following another agreement was made between *Lowe & Smith* and *Fountain*, by which the debt from *Fountain* to *Lowe & Smith* was stated and settled, and its liquidation provided for. The Chatham lot was to be taken by those parties at $1,300 on account of the debt, they assuming payment of the mortgage, and for the balance, which was settled at $2,208, a promissory note was given by *Fountain*, indorsed by his wife and one *Taylor*; and it was part of the arrangement that Mrs. *Fountain* should release her dower in the Chatham lot, and for this she was to receive an absolute conveyance to herself of the Raleigh lot. The value of the Raleigh lot the evidence shewed to have been about $2,000, or taking the mortgage into account, about $1,700. The value of the Chatham lot, taking the amount at which it was taken by *Lowe & Smith*, seems to have been about the same, *i. e.*, its full value, but the mortgage to which it was subject was $700, leaving its net value $1,300.

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The cause came on to be heard at the sittings of the Court in London. October 22, 1873.

Mr. *Moss*, Q. C., for plaintiff.

Mr. *Maclennan*, Q. C., for the defendants.

SPRAGGE, C.—[After stating the case as above.] Mrs. *Fountain* was dowable inchoately, therefore, of property worth say $1,300—that she gave up, and what she received was an absolute title to property, the net value of which was $1,700. It is palpable that what she gave bore a very small proportion to what she received. If her dower had accrued, her right would have been a tenancy for life of one-third of a property worth $1,300, and she receives a property in fee worth $1,700 The two things are out of all proportion. It is something beyond mere inadequacy. Judgment.

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I have put the interest of the wife at the highest, in supposing her to have an *inchoate* right of dower in the equity of redemption, and so having some valuable interest to give by way of consideration, but there is great force in what is said by Mr. *May* in his treatise on the Statute of Elizabeth, p. 269. After referring to the old law in relation to dower in England as it stood before 3 & 4 Wm. IV. ch. 105, and observing that under the old law, the wife relinquishing her right of dower might constitute a valuable consideration between herself and her husband, he proceeds to say, "But now that the right to dower of women married since the 1st of January, 1838, has been placed completely within the power of their husbands, it is apprehended that a release of dower could hardly be relied on as any consideration for a contract." The reasoning applies precisely to dower in an equity of redemption, inasmuch as it is only where the husband dies seized that the right to dower accrues, and he may defeat the right by alienation, as under the Statute of Wm. alienation by the husband has the same effect.

Judgment

I am clear that it is not a transaction that can be upheld against a creditor. The law upon this point is well stated by Chancellor *Kent* in his commentaries (*a*): "The settlement after marriage between the husband and wife may be good provided the settler has received a fair and reasonable consideration in value for the thing settled, so as to repel the presumption of fraud. It is a sufficient consideration to support such a settlement, that the wife relinquishes her own estate or agrees to make a charge upon it for the benefit of her husband, or even if she agrees to part with a contingent interest. But the amount of the consideration must be such as to bear a reasonable proportion to the value of the thing settled, and when valid these post-nuptial

(*a*) Vol. 2, p. 174.

settlements will prevail against existing creditors, and subsequent purchasers." See also *Arundel* v. *Phipps (a)*. 1876. Black v. Fountain.

The judgment of the late Vice Chancellor *Mowat*, in *Crawford* v. *Meldrum* (*b*) in appeal, and which was adopted by the Court, contains this passage :—" A voluntary deed is clearly void as against creditors, however meritorious a consideration it may have ; and it is obviously as great a fraud on creditors for an insolvent to put his property out of the reach of creditors, by transferring it to a friend at an under value, as by transferring it to him without receiving for it any valuable consideration." And in this I entirely concur, though I differed in that case upon the facts.

The question then arises whether there were in this case creditors, actual or prospective, upon whom this transaction was a fraud. It is clear from the evidence, especially that of the wife, which I thought more honestly given than that of the husband, that a leading object was to provide against the contingencies of trade, quite as much so, perhaps more than was the case in *Buckland* v. *Rose (c)*, for *Fountain* had failed twice before this and was still continuing business, and the failure now under consideration was in the February following. The evidence of the wife is clear enough as to the object. Judgment.

It is true that there was nominally a further consideration, the wife indorsing the note given to *Lowe & Smith*, but she was assured, and she believed, that she would never be called upon to meet it, nor has she, for although $700 of it remains unpaid that sum is represented by a note to which she is not a party, but another indorser, a Mr. *Taylor*, who had also indorsed the original note, is a party.

(*a*) 10 Ves. 146. (*b*) 3 E. & Ap. 101. (*c*) 7 Gr. 440.

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All along that debt, reduced from time to time, has continued, *Lowe & Smith* being principal creditors, and *Taylor* a surety.

Then it seems that the $300 mortgage has been paid off. There have been some payments nominally by the wife, perhaps to a very small extent really by her, practically it has been paid off by the insolvent.

It would appear therefore that that mortgage, with a really trifling exception, has been paid off, and the debt to *Lowe & Smith* reduced from $2,208 to $700 at the expense of the present creditors.

The creditors represented by the present plaintiff will not, as I gather from his evidence, realize more than fifty cents in the dollar.

Judgment

In addition to the cases already cited I would refer to *Townsend* v. *Westacott* (*a*), *Skarf* v. *Soulby* (*b*), *Jenkyn* v. *Vaughan* (*c*), *Crossley* v. *Elworthy* (*d*), *MacKay* v. *Douglas* (*e*).

In my judgment this transaction was a fraud upon the creditors, and ought to be set aside as against them, and the decree must be with costs.

(*a*) 2 Bev. 340.
(*b*) 1 Mac. & G. 364.
(*c*) 3 Dy. 419.
(*d*) L. R. 12 Eq. 158.
(*e*) L. R. 14 Eq. 106.

1876.

PARKER V. THE VINEGROWERS' ASSOCIATION.

Mortgage—Time for payment—Default in payment of interest—Rights of mortgagor and mortgagee.

The rights of mortgagor and mortgagee are reciprocal, in so far as the right to redeem being shewn the right to foreclose is thereby established; although the identical conditions attached to the one right may not be attached to the other.

By the terms of the proviso for redemption in a mortgage, the principal money was to remain unpaid so long as the interest reserved was paid at the days and times specified therefor; but, in default of payment of the interest for a period of six months, then the whole of the principal money should become due and payable:

Held, that a bill to foreclose would not lie for any default in payment of interest for a shorter time than six months, although, as it fell due, the interest could be collected: and *Quære*, whether in such a case the mortgagor would have the right to pay the principal money against the will of the mortgagee, by giving six months' notice, or paying six months' interest in advance; or whether he could take advantage of his own default in non-payment of interest for six months, and claim *that* as the condition on which he was at liberty to redeem. But *semble* he is bound to wait until the mortgagee insists on the default as giving him a right to foreclose before the right to redeem arises in favour of the mortgagor.

Statement.

This was a foreclosure suit and came on to be heard on bill and answer. The facts giving rise to the suit and the points in issue are clearly stated in the judgment.

Mr. *Fitzgerald*, Q. C., for the plaintiff.

Mr. *Crombie*, for the defendants.

Judgment.

BLAKE, V. C.—The defendants are owners of a piece of property subject to a mortgage dated the 1st of December, 1865, which contains the following proviso: "Provided always, and these presents are upon this express condition, that if the said party of the first part, his heirs, executors, administrators, or assigns, or any of them, do and shall well and truly pay, or cause to be paid unto the said party of the second part, his executors,

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administrators, or assigns, the just and full sum of $20,000 of lawful money of Canada, with interest thereon at the rate of 10 per cent. per annum, on the days and times and in the manner following, that is to say: the interest at the rate of 10 per cent. per annum, to be paid half yearly, on the 16th day of February and the 16th day of August in each and every year so long as the said principal sum of $20,000 remains unpaid as hereafter mentioned; the first payment of interest amounting to the sum of $2,000, being one year's interest on the said principal sum to become due on the 16th of February, A.D., 1866; and the said principal sum to remain unpaid so long as the said party of the first part shall pay or cause to be paid the said interest at the days and times aforesaid; and in default of payment of the said interest for six months, then that the whole of the said principal sum shall become due and payable," &c. At the time of the filing of the bill, default had been made in payment of the interest, but not for a period of six months. The questions discussed before me were, whether the whole of the principal money and interest became due by this default, or whether six months' interest alone was due, and if so whether the plaintiff had a right to file his bill, and if he had, whether for the whole amount secured by the mortgage or only for the interest overdue.

Judgment.

I think the effect of the proviso is to allow the mortgagor to retain the money until default in punctual payment be made by him; that as the interest accrues it can be collected, and that it falls due on the 16th day of February and August in each year; and that if default be made in payment of the interest for six months then the whole of the principal money becomes due and payable. I do not see on what principle parties should be prevented by this Court from entering into such an arrangement. By this agreement neither the land nor the money is tied up. The mortgagor on

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paying his instalments as they become due has the right to enjoy the premises, to alienate them, if he thinks proper, and to discharge them from this incumbrance; and the mortgagee either leaves the money outstanding and in the meantime receives a rate of interest which makes the investment an admirable one, or if he desires to call in his money, transfers the security to a person seeking an investment. Here the mortgagor has, as a matter of fact, disposed of the premises to the present defendants, subject to the mortgage in question.

Mr. *Spence* (*a*) says, "A mortgage of freehold land at common law was by feoffment in fee, upon condition to be voided, if the feoffor or his heirs should, on a fixed day—and if no day was fixed, then any time within the feoffor's life was understood—pay the debt and interest agreed upon to the feoffee or his representatives."

Judgment.

The statement of Mr. *Fisher* (*b*) is, "There will be no foreclosure until default in payment according to the agreement; but as the right of redemption may be postponed, during a certain period, so the mortgagee's right to call in the money and consequently to foreclose or sell may also be limited; and the limitation may be greater than that upon the right to redeen, for the same reason does not exist for guarding the rights of the mortgagee as of the mortgagor. There is, therefore, no objection to an agreement that the debt shall not be called in during the lifetime of any particular person, and unless fraud were proved, it is probable that no objection would be made to any postponement of the right."

It is often said that the rights of mortgagor and mortgagee are reciprocal as to the redemption or fore-

(*a*) Vol. 2, p. 614.

(*b*) Vol. 1, S. 656.

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closure of the estate. There is no doubt that the right to redeem implies the right to foreclose and *vice versa*, but because these rights are reciprocal it does not follow that the identical conditions attached to the one right are to be attached to the other. By the terms of the instrument the condition may be imposed as against the mortgagee, that this liberty to redeem may at any time or on giving six months or some other notice, or payment of interest in advance, be exercised by the mortgagor ; while, in favour of the mortgagor it may be agreed that the liberty to foreclose shall not be exercised for a period of years. Where a mortgage is given to secure a debt, and no time is specified for its payment, the amount secured can be collected at once. I do not think there is much, if any, doubt that here the right of the mortgagor as to redemption is as I have above stated it to be, although it was argued as a difficult question, to determine whether the mortgagor would have the right against the will of the mortgagee to pay the money when he pleased on giving six months notice, or paying six months interest in advance; or whether he could take advantage of his default in non-payment of the interest for six months and claim *that* as the condition on which he was to be at liberty to pay ; or whether he must wait until the mortgagee insists on this default before the right to redeem arises in his favor. Holding as I do that all the terms on which the alternative right of foreclosing or redeeming may be exercised, need not be identical, it is not necessary to consider on what exact conditions under this instrument the defendants could redeem. It is only incumbent on me to decide whether there has been such default on the part of the defendants, as that, *in invitum*, they can be compelled through a foreclosure suit to pay any, and if so, what portion, of the money, secured by the mortgage. Now on what terms has the mortgagee accepted of this security so far as the calling in of the principal money is concerned ? " The said principal sum to remain un-

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paid so long as the said party of the first part shall pay or cause to be paid, the said interest at the days and times aforesaid." It seems out of the question to say that in the face of this clause expressing the terms on which the "principal sum" is "to remain unpaid;" the mortgagor, while observing the condition imposed upon him, can be made liable for the money, the payment of which is thus postponed. Then, having thus postponed the period for payment of the principal money, the effect of default in making good this proviso is thus specified—"in default of payment of the said interest for six months, then that the whole of the said principal sum shall become due and payable." The conveyancer, doubtless aware of the rule of the Court that where default has taken place in payment of interest the whole of the mortgage money becomes due forthwith (*a*), adds a clause whereby this result is not to follow, and whereby the condition or proviso as to payment of principal money is so modified as that the default of the mortgagor for any period less than six months in meeting his instalments will still enable him to postpone the calling in of the principal money. These two sentences must be read together as forming the provision or agreement of the parties upon this question. If the principal money were payable by instalments, then some weight might be laid on the fact that in the latter clause there appears the word, "whole," and it might have been argued that the first clause was intended to provide for the calling in of the instalments of the principal money due the moment default was made in payment of interest, but that if this default continued for six months then the whole of the mortgage money could be called in. As the whole principal money is payable in one sum this difficulty does not arise.

Judgment.

It appears to me then, that until the defendants have

(*a*) *Cameron* v. *McRae*, 3 Gr. 311.

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been six months in default in payment of an instalment of interest, the plaintiff has no right to sue for the principal money, and that the ordinary right of a mortgagee in that respect must be controlled by the positive statement of the parties set forth in the security. This default has not taken place, and therefore the principal money cannot now be called in. It was further argued by counsel for the defendants that under these circumstances, a bill of foreclosure will not lie to recover even the interest overdue, and *Burrows* v. *Mallory* (*a*) was cited as an authority for this proposition. There is no doubt of the rule laid down there—nor of the more than ordinary weight that must be attached to a decision of Lord *St. Leonards* on a question of this kind. The covenant in the case with which he had to deal was that the principal sum of £900, or any part thereof, should not be called in until after the decease of *Otway*. There was no agreement to postpone until that period the payment of interest, which was in arrear when the bill was filed. On this state of facts it was argued that the right to foreclose was postponed in toto until the decease of *Otway*. There the principal money was not payable until the death of *Otway*. Here it is not payable until six months' default in payment of interest. There there was default in the payment of the interest and, on a bill filed before the decease of *Otway*, the late Chancellor thus deals with the question :—"There is an actual covenant by the mortgagee that he will not call in the principal money during the lifetime of the mortgagor, which is not qualified by any stipulation respecting the payment of the interest in the meantime or of the rent reserved by the lease. * * * I do not see how any default in the payment of the interest during the lifetime of the mortgagor, can enable the mortgagee to commit a breach of his covenant. * * * I think, therefore, that under these circumstances

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(*a*) 2 Jo. & La. 521.

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the plaintiff was not at liberty to file his bill for a foreclosure, as far as relates to the principal money, and, therefore, cannot do so in respect of the interest which accrued before the principal sum became payable." The conclusion arrived at is distinct, althongh the reasons for it are not given. It may have been that it was not thought proper to allow bills to be filed on different defaults, or of the difficulty of working out the decree in case of payment, or that the mortgagee is not entitled to claim the premises, until he is in a position to make a demand for the whole sum secured by his mortgage The authority, however, is one in point, and which I am bound to follow. I cannot find any case in Great Britain but this in which the question has been decided, although the text books cite the decision of Lord *St. Leonards* as one which meets with approval. Mr. *Fisher* says (657): "If there be an absolute covenant not to call in the money during a certain period (and here the proviso is for this purpose equivalent to such a covenant), no default in payment of interest during that period will enable the mortgagee to sue, notwithstanding the breach of the condition in the mortgage, though if there be no such covenant the mortgagee can sue at any time after default in payment of interest, however distant may be the day at which payment of the principal money is reserved." To *Davidson's* Precedents in Conveyancing (p. 594 note *f.*) there is this note: "In *Burrows* v. *Mallory* the mortgagee was not allowed to foreclose, though the interest was not kept down."

Judgment.

In *Cameron* v, *McRae* (*a*) the full Court adopted without question, *Burrows* v. *Mallory* as a binding authority. The then Chancellor says (p. 312): "Where the mortgagee has not disabled himself from calling in his principal, in that case any default on the part of the mortgagor, in payment of interest or principal, is a

(*a*) 3 Gr. 311.

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breach of the condition, which makes the estate of the mortgagee absolute at law and entitles him as a necessary consequence to file a bill for the foreclosure of the mortgagor's equity of redemption." In reference to *Burrows* v. *Mallory* he proceeds to say "But the question now before us was the very point there in judgment. Had there been any precedent or principle to justify such a decree as is suggested here—that is, a decree *nisi* to become absolute upon failure of the mortgagor to pay interest or a part of the principal—then the plaintiff in that case would have been entitled to relief. For, although the mortgagee had precluded himself from calling in the principal, the interest had been reserved half yearly, and the decree suggested here would have been exactly suited to the circumstances in which the plaintiff was placed. But, because he had precluded himself from calling in the principal during his lifetime by express covenant, the Chancellor concluded that he had thereby precluded himself from filing a bill of foreclosure, for any interim default, thus deciding, as I understand the case, the very point now before us."

Judgment.

I am bound to hold that the plaintiff's bill has been filed prematurely and that it must be dismissed with costs.

1876.

BROTHERTON v. HETHERINGTON.

Mortgage—Improvements.

Mortgagors released their equity of redemption to the mortgagee, who about two months afterwards signed a memorandum agreeing to reconvey upon being paid principal and interest and all costs of improvements made by her.

Held, on a bill to redeem, that the mortgagee was entitled to recover for all permanent and lasting improvements although the estate might not have been increased in value to an amount equal to the sum expended thereon.

And where the mortgagors so entering into the agreement were merely trustees, and the person beneficially interested was cognizant of the various improvements being made, and stood by and permitted them:

Held, that neither he nor those entitled through him could be permitted to redeem without paying for such improvements.

This was an appeal from the report of one of the local Masters, by the defendant.

Statement.

The defendant had been mortgagee of the premises in question, and subsequently obtained a release of the equity of redemption, giving back a memorandum by which she covenanted and agreed with the mortgagors, &c., that if they, or either of them, "should at any time within three years pay unto her $2,000, with interest from the 1st May, 1867, and also all costs of improvements made by her upon the said lands since that day, she would reconvey, bargain, sell, release, assign and assure unto them, or either of them, the said lands in fee simple, free," &c., and the present suit was instituted for the purpose of redeeming the mortgage.

The other facts and the question involved are clearly stated in the judgment.

Mr. *Ewart*, for the appeal.

Mr. *Lash*, contra.

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Blackford v. *Davis* (*a*), *Constable* v. *Guest* (*b*), *Fee* v. *Cobine* (*c*), were referred to.

PROUDFOOT, V. C.—The decree in this cause declared that the plaintiff *Maria Hetherington* was a mortgagee only of the lands and premises in question, and referred it to the Master to take an account of the amount due to her as mortgagee.

The decree was made upon motion. The defendant by her answer referred to a paper of the 27th of June, 1869, which I shall immediately notice, and stated her readiness to be considered a mortgagee of the lands and submitted to be redeemed, all just allowances being made to her.

The defendant had been a mortgagee of these lands under an indenture of 11th September, 1861, made by *Charles Prince* and *Septimus Prince*; and on the

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1st of May, 1867, they released to her the equity of redemption.

Upon a certified copy of that release was indorsed the instrument of 27th June, 1867, which was a memorandum signed and sealed by the defendant, stating that in consideration of the release the defendant covenanted and promised with and to *Charles Prince*, *Septimus Prince*, and the Hon. *John Prince*, that if they or either of them, their or any of their heirs, &c., should at any time within three years pay unto her $2,000 with interest from the 1st May, 1867, and also all costs of improvements made by her upon the said lands since that day, she would reconvey, bargain, sell, release, assign, and assure unto them or either of them the said lands in fee simple, free from all charges and incumbrances made by her.

(*a*) L. R. 4 Ch. 304. (*b*) 6 Gr. 510.
(*c*) 11 Ir. Eq. R. 406.

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The Master has proceeded to take an account of the amount due to the defendant, and has certified that he has allowed to her $500 and no more for her improvements. He has arrived at this sum on the assumption that the defendant was entitled only to the amount by which the value of the premises had been increased by the improvements.

The defendant appeals because the Master has not allowed her a larger sum than $500 for improvements made by her.

In an ordinary mortgage case the rule acted on by the Master is a correct one. If there be nothing more than a mortgage securing the repayment of the money, without any provision for improvements, the Court is strict in seeing that those which have been made are such as are necessary for the maintenance and benefit of the mortgaged property ; in going further than this the mortgagee runs great risk unless the mortgagor has consented to the expenditure.

Judgment.

But where the parties have agreed to pay for improvements to a greater extent, or in a different manner than the Court would sanction without such agreement, there is nothing to prevent them doing so.

In this case the decree was made upon motion, and depended upon the submission in the answer of the defendant to be considered merely as a mortgagee, a submission coupled with a proviso that all just allowances be made to her. Without this proviso, however, she would under our general order 220 have been entitled to such allowances under an ordinary decree. The case cited of *Blackford* v. *Davis* (*a*), is ample authority for the Master allowing the *costs* of the im-

(*a*) L. R. 4 Ch. 304.

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provements pursuant to the agreement, either as just allowances or as a principal sum due upon the security.

What is a just allowance must have reference to the instrument under which she suffers herself to be treated as a mortgagee, and that expressly stipulates that she is to be entitled not only to the improvements made by her, which might, perhaps, only extend to ordinary mortgagee's improvements, but to the *costs* of these improvements, introducing an entirely distinct element; not merely the benefit the estate might derive from them, but the expense to which the defendant was put in making them; and this is not an unreasonable construction to place on the agreement. By the release of the equity of redemption she had become the absolute owner of the estate, and had she chosen to insist upon it, it is possible she might have still retained the property. The agreement on its face is not a mortgage, but a conditional sale, and the condition had been forfeited. When she exercised it she had the power to say on what terms she would sell, and she chose to require payment of what her improvements might cost her.

Judgment.

The improvements made seem all to have been of a permanent character—a drain to the river, two cellars, a root house, double windows, and an addition to the house. It is said that they have been such as to change the character of the house, and to render it more adapted for a public, than a private, house. I do not think it necessary to inquire further than to see that they were of a permanent character, for she was the owner of the property and not bound to retain it in the same character in which it previously existed. The *Princes* were not bound to purchase, and I do not see anything to require her to keep it in the same condition on the chance of their buying.

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By the decree, however, it has been determined that whatever interest in the property appeared to belong to *Charles* and *Septimus Prince*, was really in trust for their father Colonel *Prince*; and upon the evidence taken before the Master, Colonel *Prince* seems to have been cognizant of the various improvements going on, he stood by and permitted them to be made, and neither he nor those who may be entitled through him can be permitted to redeem the property without paying for them.

The appeal must be allowed, and with costs.

Re McQueen, McQueen v. McMillan.

Guardian of infants.

The father of infants died intestate, and his widow obtained letters of administration, who by her will appointed her sister, a married woman, sole guardian of her two infant daughters. After her death the paternal grandfather of the infants applied to the Judge of the Surrogate Court to be appointed their guardian, who, in opposition to objections made by the sister, did appoint him their guardian:

Held, on appeal, (1) that although this Court has jurisdiction to appoint guardians to infants notwithstanding the enactment of the Surrogate Act (22 Vic. ch. 93) it will not do so on an appeal like this; (2) that the fact of the person named as guardian in the will of the deceased mother of the children being a married woman was itself sufficient to prevent the Court appointing her.

It is not the practice of the Court to give weight to the objection that a person sought to be appointed guardian to an infant is the next of kin to whom the lands of the infant would descend.

Re *Stannard* (1 Ch. Cham. Rep. 15) referred to and approved of.

Statement.

This was an appeal by the defendant, *Kate McMillan*, from an order of the Judge of the Surrogate Court of the County of Simcoe, by which he appointed *Donald McQueen*, the paternal grandfather of *Mary McQueen* and *Archiphine McQueen*, children of *Archibald Mc-*

1876. Re McQueen. *Queen*, deceased, their guardian. *Donald McQueen* had also been appointed guardian of *Duncan James McQueen*, a son of *Archibald*, by the Surrogate Court of the County of Victoria.

The grounds of appeal were, that *Donald McQueen* was not a suitable and discreet person to be appointed guardian of said infants, and that *Kate McMillan* is the testamentary guardian of said infants appointed by the mother of the infants in her will.

Archibald McQueen, the father of the children, died intestate in October, 1870. Letters of administration of his estate were granted to his widow, *Flora*. She died on the 10th May, 1875, having made a will, in which she desired that the defendant should take charge of the female infants, and that they should reside and live with her, and appointed her their guardian.

Statement. The defendant was the maternal aunt of the children, and married to one *J. L. McMillan*.

On the plaintiff's application to be appointed guardian the defendant pleaded, (1.) Her appointment as guardian by the mother of the girls; that she had accepted the trust, and had taken them to live with her, and had fed, lodged, and taken care of and provided them with all necessaries.

(2.) That the plaintiff was an old man, being upwards of eighty years of age, and very feeble and infirm, and not as able and competent to take care of said children as defendant.

(3.) That the defendant was the more suitable person to act as guardian of these girls.

By consent these pleas were all struck out and an

issue directed to be tried before the Court itself in a summary way, touching the truth of the substance of the defendant's second plea, the plaintiff in such issue affirming that he was a fit, suitable, and proper person to be appointed guardian to the said infants ; and the defendant in such issue affirming that the plaintiff was not such a fit, suitable, and proper person as aforesaid. 1876. Re McQueen.

Upon the trial of this issue the only persons examined were Mrs. *McMillan* and *Donald McQueen,* and from the examination of Mrs. *McMillan* it appeared that her objections to *Donald McQueen's* appointment were his great age, which she put at seventy-five or eighty, and his delicate health.

McQueen stated his age to be about seventy, his farm being worked by a son, who resided with him. The Judge stated him to be a hale old man, and to have impressed him favorably.

Mr. *Hoskin*, for the appeal.

Mr. *Moss,* contra.

The authorities cited are mentioned in the judgment.

Proudfoot, V. C.—It was not contended that the mother had the right to appoint guardians to her children, but it was said that her nomination ought to be respected, and that the Surrogate Court should have appointed the aunt guardian. Judgment.

The case of *Re Kaye* (*a*) is a clear authority that if no valid appointment has been made the Court will not appoint a married woman as sole guardian. In that case *Stuart*, V. C., had appointed a married woman,

(*a*) L. R. 1 Chy. 387.

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yet, notwithstanding the reluctance of the appellate Court to interfere with the discretion of a Judge, the appointment was reversed on the sole ground that the appointment of a married woman to be sole guardian raised a difficulty in the way of supporting the order under appeal that was insurmountable.

But the issue before the Judge of the Surrogate Court was not upon the propriety of appointing Mrs. *McMillan*, but of appointing Mr. *McQueen;* that was an issue by consent, and the question upon this appeal is simply whether the Judge decided that issue correctly. There is no imputation on Mr. *McQueen's* character ; the objections are his age, and delicate health, and that he cannot legally be appointed guardian, as he could not be guardian in socage, being a person to whom the lands of the infants would descend in case of their death. The Judge has seen Mr. *McQueen* ; his age is not so great as alleged, and in place of being delicate he seems to be a hale old man. He does not need to work ; his farm is cultivated by a son ; he resides near a school, and I see no evidence upon which I could reverse the decision of the Judge on this point.

Judgment.

On the other ground, I do not think it is the practice to pay much attention to the objection to persons in the line of inheritance. *Chambers* p. 101, says: "It is certain that the maxim of the Common Law, that the next of kin to whom the land might descend should not be guardian, is not regarded in Chancery, since, as Lord *Macclesfield*, said (2 P. Wms. 264) it is not grounded in reason, and only prevailed in barbarous times. In many instances, those have been appointed guardians who have had an opposite interest to the infants in the property."

So with regard to guardians for lunatics, the old rule as stated by *Blackstone*, was to refuse this guardianship

to the lunatic's next of kin, "because it is his interest that the party should die," has long been disregarded in practice. *Ex parte Cockayne* (*a*), *Schouler* on Domestic Relations, 403 ; *Shelford* on Lunacy, 131 *et. seq.* ; *Le Heup*, *Ex parte* (*b*). 1876. Re McQueen.

I am then asked to appoint Mrs. *McMillan* and Mr. *McQueen* joint guardians of these children. But from the terms on which these parties now are to each other I do not think it would be for the interest of the children. Mr. *McQueen* on his examination says: "I would not like the little children to be with Mrs. *McMillan*, even if she kept them for nothing. (Her counsel said she would be willing to do so). I don't want anybody to keep them for nothing, when there are means left to pay for them. I don't wish them to be with her. I don't want to say anything, but I think I could do better for them." It seems plain from this that the two could not work harmoniously.

Judgment.

That this Court has jurisdiction to appoint guardians, notwithstanding the enactment in the Surrogate Act (*c*), has been determined by the present Chancellor (*d*); but I doubt whether it can be done upon an appeal, like this, from the Surrogate Court. As I do not think the joint appointment now asked would be beneficial, it is needless to pursue this question.

It would have been satisfactory to me if the Judge had seen his way to comply with the wishes of the mother. But on these proceedings I cannot say he has decided erroneously. Appeal dismissed with costs.

(*a*) 7 Ves. 591.
(*b*) 18 Ves. 221.
(*c*) 22 Vic. ch. 93 sec. 63, C. S. U. C. ch. 74, sec. 1.
(*d*) *Re Stannard*, infants, 1 Chy. Ch. R. 15.

1876.

HERON v. MOFFATT.

Trustee and cestui que trust—Purchase by trustee.

The fact that a trustee when offering some of the trust lands for sale by auction, at the same time offered some of his own property, and employed the same person to bid for it that he authorized to buy in the trust property, with a view of saving it from being sold at an undervalue, will not warrant the *cestius que trust* in calling upon the trustee to perfect the purchase made by his agent of the trust estate.

After the judgment, as reported *ante* volume xxii., page 370, where the facts sufficiently appear, the plaintiffs proceeded to a hearing at the then ensuing examination term in Toronto, before the Chancellor, and then gave evidence that *Moffatt* had, at the auction sale spoken of, offered some property of his own for sale by auction, and had the same person (*Barclay*) employed as his agent to bid for that lot, as well as for the property held in trust; and that *Barclay* did accordingly bid, and the property was knocked down to him, when the auctioneer called upon him to sign the sale book, and he (*Barclay*) then explained that his bidding was as *Moffatt's* agent only, and therefore the auctioneer did not press *Barclay* to sign, considering, as he stated, both properties bought in. It was contended for the plaintiffs that the case now was distinguishable from that presented on the motion for injunction, and that *Moffatt* was bound to complete the contract, which was valid by reason of *Barclay's* name being entered in the book as agent for *Moffatt*.

Statement.

Mr. *Boyd*, for the plaintiffs, contended that the alteration in the circumstances of the case was such that if it had been known at the time of the motion for injunction and presented to the learned Judge who heard the motion, it is probable he would have granted the application, as the case upon which he had proceeded in

refusing the injunction was *Ex parte Peyton* (*a*). The sale here was unquestionably in contravention of the Statute 31 Victoria, ch. 28, O., and the contract proved in the case was clearly such as the Court could direct to be specifically carried out. *Ex parte Gover* (*b*), *Kaitling* v. *Parkin* (*c*), *Lewin* on Trusts (ed. 1875) p. 385, *Perry* on Trusts (2nd ed.) sec. 288.

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As shewing that *Moffatt* had no right to charge the moneys paid for insurance against the estate he cited, amongst other cases, *Bell* v. *Carter* (*d*), *Chambers* v. *Waters* (*e*), *Schweitzer* v. *Mayhew* (*f*), *Jefferys* v. *Dickson* (*g*), *McIntosh* v. *Ontario Bank* (*h*), *Bailey* v. *Gould* (*i*).

Mr. *Crooks*, Q. C., and Mr. *G. D. Boulton*, for defendants, submitted that *Moffatt* was perfectly justified in protecting the interests of the estate by procuring the services of *Barclay* to bid in the property, and who had done so simply as the agent of *Moffatt*, and for no other purpose than to advance the interests of those beneficially interested therein. In this view the fact that *Barclay* was declared the purchaser could not possibly bind *Moffatt* to any greater extent than if *Moffatt* himself had been in a position to bid, had done so, and been declared the purchaser.

Argument.

As to *Moffatt's* right to be recouped the insurance moneys that question has already been disposed of by the Vice-Chancellor.

Dobson v. *Land* (*j*), *Hobday* v. *Peters* (*k*), *Scholfield* v. *Lockwood* (*l*), *Norris* v. *The Caledonian Railway* (*m*),

(*a*) 30 Beav. 252.
(*b*) 1 De G. 349.
(*c*) 23 C. P. 569.
(*d*) 17 Beav. 11.
(*e*) 3 Sim. 42.
(*f*) 31 Beav. 37.
(*g*) L. R. 1 Ch. 183.
(*h*) 20 Gr. 24.
(*i*) 4 Y. & C. Ex. 221.
(*j*) 8 Hare 216.
(*k*) 28 Beav. 603.
(*l*) 9 Jur. N. S. 738 and 1258.
(*m*) L. R. 8 Eq. 127.

1876. *Lewin* on Trusts, 6 ed., 489 ; *Fisher* on Mortgages, 2 ed., 886, were amongst other cases referred to.

Heron v. Moffatt. April 3rd.

SPRAGGE, C.—At the close of the case I stated my impression to be that the case was not substantially varied by the evidence given at the hearing from what it was as presented to my brother *Proudfoot*, on the application for the injunction. I have since read the judgment of my learned brother, and it leaves me scarcely anything to say.

There is one point which does not appear to have been before him, upon which I understand Mr. *Boyd* chiefly to rely, as distinguishing the case at the hearing from the case presented on the interlocutory application, namely : that *Moffatt*, offering for sale some private property of his own at the same auction, had *Barclay* present as his agent to bid for one as well as the other ; that the mill property having been put up at the upset price of $12,000, as agreed upon by Mr. *Cattanach* and Mr. *Moffatt*, and Mr. *Barclay* having bid an advance of $20, it was knocked down to him at that bid, and his name entered as purchaser at the sum bid by the auctioneer, Mr. *Coate*. *Coate* knew before the change in the terms and conditions of sale, *i. e.*, before the sale commenced, that a person named *Barclay* was to be present as agent for Mr. *Moffatt* to bid at the sale ; but the man was personally unknown to him, and *Barclay* does not appear to have been informed that under the altered conditions of sale he was not to bid. Mr. *Coate*, after entering *Barclay's* name as purchaser for the mill property, proceeded to offer for sale a property of Mr. *Moffatt's* called the Dawn lot, at an upset price, and upon that also *Barclay* bid an advance, and his name was entered as purchaser, and Mr. *Coate* called upon him to come forward and sign the book, when he explained that his bidding was as *Moffatt's* agent, and *Coate* did not press him, considering the properties

Judgment.

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bought in. It is contended that *Moffatt* ought at once, upon the mill being knocked down to *Barclay*, if not before, to have repudiated *Barclay's* agency; that by not doing so and leaving him to bid upon the next lot put up, the same being his own private property, he adopted his agency; that the entry of *Barclay's* name in the book as purchaser of the mill property made a valid contract, and a contract entered into by *Moffatt's* agent, by which *Moffatt* is bound.

No doubt he would be bound if he had bid with the intention of becoming a purchaser; but it is quite clear that he had no intention of becoming a purchaser, and if he had not, the bidding was in order only to get a good price. It may be irregular or even improper, but *Barclay's* agency, taking it to be ever so strongly established, cannot be more binding upon him than if he had bid himself. The judgment already delivered is clear upon these points:—"These cases establish that if a trustee for sale buy in the property, intending to become the purchaser, the *cestui que trust* has the option of holding him to his bargain. *Campbell* v. *Walker* (*a*). And it seems also that assignees in bankruptcy cannot buy in the property for the benefit of the estate, unless having authority from the creditors,—and if they do so, they may be held to their purchase. In the class of cases, however, represented by *Campbell* v. *Walker*, the trustee bid with the intention of purchasing for himself. In the bankruptcy cases it has to be noticed that the assignee had no discretion, no authority to interfere with the sale; his duty was to carry out the instructions of the creditors. In this case, however, the trustee was authorized, *in his sole and independent discretion*, to sell either at public auction or private contract for cash or on credit at fair reasonable prices, and to re-sell. So that *Moffatt* was the person who was to exercise the discretion that in bankruptcy is vested in the creditors.

Judgment.

(*a*) 16 Gr. 526.

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It is the duty of a trustee for sale to take reasonable precaution to protect the property to prevent its being disposed of at an undervalue."

The instructions given to *Barclay* ought certainly under the altered conditions of sale to have been countermanded; but I cannot see how it follows that because they were not, *Moffatt* is to be fixed with the purchase. It would be visiting him *in pœnam* with a consequence not warranted by any of the cases, and for which I see no sufficient reason.

Upon the question of *Moffatt* being disallowed the moneys expended by him in insuring the buildings, the subject of the trust, I entirely agree with my brother *Proudfoot*.

Judgment.

"The right of *Moffatt* to charge the premiums of insurance was discussed. * * * The question depends on whether *Moffatt* was a trustee or only a mortgagee; and considering the duties imposed on him by the agreement, I have no difficulty in determining him to be a trustee. And a trustee is entitled to insure, and charge the premiums against the estate."

I expressed myself to that effect at the hearing.

The plaintiffs are entitled to an account. There will be a reference and further directions, and subsequent costs will be reserved. The defendant will be entitled to costs up to the hearing, upon the same ground that costs were given to him on the refusal of the injunction by my brother *Proudfoot*.

1876.

ATKINSON v. GALLAGHER.

Solicitor and client—Mortgage—Security for costs to be incurred.

The clear rule of law is, that a mortgage given by a client to his solicitor to secure costs to be incurred in the future, is absolutely void as being against public policy.

A mortgage for $1,200 was created by a third party, who was indebted to *G.*, in favour of a solicitor, as security for such costs as he might incur in carrying on a suit for *G.* The client afterwards consented to the solicitor assigning the mortgage to an amount not to exceed $500, which was done. In a suit afterwards instituted by the assignee of the security, to enforce payment of that amount, to which the solicitor was made a defendant:

Held, (1) that the security was valid to the extent only of what was actually due to the solicitor for costs at the date of the mortgage. And the assignee having failed to notify the mortgagor of the assignment, by reason of which a sum of $530 had been by the client allowed to be paid to the solicitor:

Held, (2) that the assignee could only recover what might be found due in respect of such costs over and above the amount so paid to the solicitor.

Statement.

In this case a mortgage for $1,200 had been created by a third party, *Edward J. Gallagher*, who it was stated was indebted to the defendant *James Gallagher*, in favour of a solicitor, as security for such costs as he might incur in carrying on a suit for the defendant *Gallagher*. It was alleged that the client afterwards consented to the solicitor assigning the mortgage to an amount not to exceed $500, which was done. This suit was afterwards instituted against *James Gallagher* and his solicitor by the assignee of the security, to enforce payment of that amount, *Edward J. Gallagher* having in the meantime conveyed his interest in the land to *James Gallagher*.

Mr. *Blake*, Q. C., and Mr. *J. Bain*, for the plaintiff.

April 6th, 1874.

The assignee of this security is in a somewhat different position from the ordinary assignee of a mortgage, the assignment being only of a portion of the amount secured. The consent here put in is altogether natural under the circumstances shewn to have existed in the

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case, and if the assignee had been led to make any inquiries it would have been to the mortgagor *Edward Gallagher*, that he would have applied, not to *James*. So far as the mortgagor was concerned the whole sum secured by the instrument was due; and although the solicitor is chargeable under the practice with the costs of the taxation, still as against the assignee those costs should not be deducted, as whatever amount was due for costs at the time the mortgage was assigned is now due to the assignee, and before the taxation was had *James Gallagher* had knowledge of the assignment.

Argument.

Mr. *C. Moss* for defendant *Gallagher*. It is *Bain's* own version of the transaction that the assignment was to have the effect of transferring the security for $500 only. It was intended in fact as a security for all costs—past as well as future—up to that amount. Now, the clear rule of the Court is, that a mortgage given to secure costs yet to be incurred is void, although it may be a good security for those already incurred. *Uppington* v. *Bullen* (*a*), *Fisher* on Mortgages sec. 368—but even so the mortgage was subject to the state of accounts between *Bain* and his client at the time. *Baskerville* v. *Otterson* (*b*).

Here *Bain* must be looked upon as the agent of *Atkinson* in the transaction; it is impossible to contend that in that dealing he was acting for *Gallagher*. Then the evidence shews that *James Gallagher* had not any notice of the assignment until October, 1870, and the rule is perfectly clear that until notice any payment to *Bain* by the *Gallaghers* was good against the assignee. The consent of *James*, which *Bain* obtained to the assignment being made, does not take the case out of the general rule. In fact it was not shewn to *Atkinson*, and he did not on the faith of it advance a dollar to *Bain*: besides, the consent could not have the effect of validating a void security. *Willens* v. *Tandy* (*c*).

(*a*) 2 D. & W. 184. (*b*) 20 Gr. 379 (*c*) 5 Ir. Eq. 1.

If *James* is bound to pay anything it can only be what upon taxation has been found due for costs; the security itself being for costs. 1876. Atkinson v. Gallagher.

The bill was taken *pro confesso* against the defendant *Bain*, who did not appear at the hearing.

SPRAGGE, C.—It seems clear upon the authorities that a mortgage given by a client to his solicitor to secure costs yet to be incurred is absolutely void as against public policy. *Jones* v. *Tripp* (*a*), *Williams* v. *Pigott* (*b*), *Uppington* v. *Bullen* (*c*), *Willens* v. *Tandy* (*d*), and other cases. April 3rd.

Where a mortgage is given to secure costs already incurred and future costs it was held in *Williams* v. *Pigott* to be good to the amount of costs already incurred, but void as to future costs. This case was cited to Lord *St. Leonards*, then Lord Chancellor of Ireland, in *Uppington* v. *Bullen*, and was scarcely approved of by him. It was not, however, necessary in that case to decide the point. Certainly the utmost that a solicitor, taking a security in the course of a cause, can claim is, to hold it for what may then be past due from his client. Judgment.

This being the state of the law, the consent afterwards given by the client that the solicitor might assign the mortgage to the extent of $500—assuming that the client signed his name to the paper knowing its contents—can make no difference. As between the solicitor and the client it could only operate by way of confirmation. In *Willens* v. *Tandy* the Master of the Rolls said no authority had been cited, and I think it will be found that no authority could be cited, to sustain the proposition that a contract which is void as being contrary to public policy (and which, I take to be, in the

(*a*) Jacob 322.
(*b*) Jacob 598.
(*c*) 2 D. & W. 184.
(*d*) 5 Ir. Eq. 71.

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Atkinson v. Gallagher.

same predicament as if it were in contravention of an express statute), can afterwards be capable of confirmation "by the acts of the parties." This consent was not shewn to, or as far as appears known by the assignee. He did not, therefore advance his money to the solicitor upon the faith of it, and can base no equity upon it. The consent was general, not naming any assignee.

The suit in which the bulk of these costs was incurred was afterwards compromised by payment of a sum of $530 by the defendant. *Gallagher* was plaintiff in the suit. His solicitor received the above amount from the defendant and claimed from his client a large sum to be due to him for costs beyond that amount, but offered to take a smaller sum. There was a taxation of costs between solicitor and client, and the costs were reduced to a much smaller sum than the solicitor had offered to receive, and the sum deducted exceeding one-

Judgment.

sixth of the costs charged against the client, the costs of taxation were charged against the solicitor, and the Master, after crediting the client with the sums received by the solicitor, found a balance still due to the solicitor, amounting to $2, and that sum the defendant by his answer has offered to pay, or whatever sum might be due to the solicitor upon a revision of taxation, the solicitor having appealed from the taxation of the Master.

If the mortgage had remained in the hands of the solicitor there could be no question but that the solicitor would have been bound to take the amount offered and discharge the mortgage, and one might reasonably expect that the solicitor would have promptly paid the difference between that sum and the amount due on the mortgage to the assignee; but he has, notwithstanding the disastrous result of the litigation in which he acted for the client, and the immense amount of that

litigation, left his client to pay the assignee the excess of the mortgage money. 1876.

Atkinson v. Gallagher.

It does not appear that the assignee of the mortgage ever notified the mortgagor or *James Gallagher*, the client of the solicitor, *Bain*, of the assignment, or in any way informed either of them that he, and not *Bain*, was entitled to be paid for the amount of his derivative mortgage. If this had been done the client might have prevented the compromise money paid by *Gairdner* from passing into the hands of *Bain*.

Upon the whole of the case I do not see how the assignee of the mortgage can stand upon a better footing than the mortgagee himself. By his bill he asks for relief only against the land, and against the mortgagor; he has made the solicitor a party, properly as a mortgagee, but asks only for payment or upon default a sale.

I have treated the mortgage as if made by the client. It was in fact made at his instance by a person from whom money was payable to himself, the solicitor being thus his appointee, and the mortgage stands upon the same footing as if made direct by the client to his solicitor. Judgment.

The offer made by the client in his answer is an offer which ought to have been accepted, inasmuch as what was offered was all that the plaintiff was entitled to. The defendant *Gallagher* is therefore entitled to his costs subsequent to the answer to the original bill, and those costs ought primarily to be paid by the solicitor as he has been the *origo mali* in the whole matter of this mortgage. I observe that the amended bill contains an allegation, shewing the defendant *James Gallagher*, the client, to be solely interested in the mortgage premises. He is entitled to deduct his costs from the balance due on his mortgage.

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If I were making a direct order for payment of the defendant's costs subsequent to the answer, I should give them against the co-defendant and the plaintiff, and direct that in the event of those costs being paid by the plaintiff he should have them over against the defendant *Bain*; and the plaintiff may, if he prefers it, take his order in that shape. I do not give any costs to the plaintiff against the defendant *Gallagher*. He swears in his answer to the amended bill that he did before the commencement of this suit tender and offer to pay to the plaintiff the balance due to the solicitor upon taxation, and he is entitled to read his answer upon the question of costs.

Judgment.

The plaintiff, I have no doubt, took this mortgage innocently and without suspecting that there was anything wrong in it, and believing, no doubt, the untrue representations of the solicitor, that it was given for money lent. It was his misfortune to be so deceived. He has, however, himself to blame in not promptly notifying the mortgagor that the mortgage had been assigned to him. If he had, *Gallagher* might have notified the defendant in that suit not to pay the money to the solicitor but to the holder of the mortgage.

There is also the question as to the appropriation of the payment received by the solicitor. It was more than sufficient to pay all the costs found upon taxation properly payable to the solicitor at the date of the mortgage, and if applicable in the first place to the earlier items of the bill, all that was due at the date of the mortgage was actually paid, and the mortgage so far as it was a valid mortgage thereby discharged.

The money still due upon taxation must be paid to some one. It is a matter of indifference to *Gallagher* to whom he pays it, and as between the solicitor and the plaintiff there can be no question that the plaintiff is the proper person to receive it.

There may be a question as to the interest. Interest should be paid from the date of service of the bill unless *Gallagher* files an affidavit shewing that he has retained the money in his hands unemployed.

Doan v. Davis.

Dower—Mortgage—Compensation to administratrix.

Where a woman joins with her husband in creating a mortgage to bar her dower for securing a debt of the husband, and after his death the lands are sold during the widow's lifetime, she is entitled to dower out of the whole value of the mortgaged premises, and not only out of their value beyond the mortgage debt.*

Letters of administration having been granted to the widow of an intestate, she, without any formal appointment as such, acted as guardian of their infant children, and received the rents and profits of the real estate, all of which she duly accounted for. The Master in taking the accounts allowed her a compensation on the receipt and application of such rents and profits, as well as the personal estate, amounting in all to $133. On further directions the Court, regarding the case as an exceptional one, refused to interfere with such allowance

Statement.

Hearing on further directions and as to the question of costs.

This was a suit for partition or sale of the estate of an intestate which was subject to a mortgage created by him, in which his wife joined to bar her dower, for the purpose of securing a sum of money due by the intestate.

On taking the usual accounts in the office of the Master at London, the Master made an allowance to the widow, who had obtained letters of administration, and had without any regular appointment acted as guardian of her infant children, who were also defendants.

The Master reported the several points mentioned in the judgment specially for the opinion of the Court.

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*See also *Lindsay* v. *Lindsay*, *post*, 210.

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Mr. *Street*, for the plaintiff, submitted that all the widow was entitled to in the shape of dower, in respect of the mortgage premises, was out of the surplus moneys remaining after payment of the mortgage debt, not out of the whole proceeds of the estate: *Campbell* v. *The Royal Canadian Bank* (*a*); *Baker* v. *Dawbarn* (*b*). He also objected to the allowance to the widow of a commission on the rents of the realty which she had improperly received, referring to *Re McMorris* (*c*); *Heney* v. *Lowe* (*d*); *Thorpe* v. *Richards* (*e*); *White* v. *Bastedo* (*f*).

Mr. *Bayley*, for the infants, in addition to the points urged for the plaintiff contended that the Master had improperly allowed the widow for past maintenance of the infants, who properly speaking should have been supported out of the rents and profits; at all events past maintenance will not be paid for out of the *corpus* of the estate.

Argument.

Mr. *Rae*, for the widow, urged that the Master should have taken the state of the account at the date of the division as the basis on which to compute the widow's dower. The widow here is in fact a surety for the debt of her husband, and as such is entitled to have the full amount of her dower paid out of any of the funds of the estate, and *Re McMorris*, cited by the other side, favours this view of the widow's position. So far as the rents were concerned the widow was simply a trustee; being such and having, as is admitted on all hands, faithfully applied the moneys so received in the administration of the estate, the Court will not now interfere with the discretion of the Master in allowing her a commission.

The past maintenance here does not in reality come out of the *corpus* of the estate, as the rents and profits would have been amply sufficient for the purpose had there been no incumbrance; and the amount of the per-

(*a*) 19 Grant 334. (*b*) 19 Grant 113. (*c*) 8 U. C. L. J. 284.
(*d*) 9 Gr. 265. (*e*) 15 Gr. 403. (*f*) 15 Gr. 546.

sonalty would have been applied in reduction of the mortgage. 1876.

Doan v. Davis.

Mr. *Street* in reply. The intestate left other debts, besides the mortgage, which would have absorbed the personal estate.

SPRAGGE, C.—I am of opinion that the widow is dowable out of the whole value of the mortgaged premises and not only of the value beyond the mortgage debt, if, as has been assumed in argument, the debt for which the mortgage was given was the debt of the husband. The report does not shew how this is; an affidavit from the widow and the mortgagee or other person cognizant of the fact may be put in. This case is stronger for the widow's contention than any of the cases cited to me.

The judgment of Mr. *Boyd*, then Master, in *Re McMorris* (*a*), contains a concise and accurate statement of the law :—" The widow's position in equity seems to be this : having barred her dower in a mortgage in fee given by her husband for his own debt, he covenanting to pay it, she surviving her husband is, in one aspect, in the position of surety for the debt, and can claim that the mortgage should be paid out of the husband's assets, so as to relieve her estate in the lands * * * The wife simply bars her dower with a view to secure the debt due by her husband ; when that debt is paid by the husband's estate she is remitted, as against the heir and volunteers claiming under the husband, to her full rights as dowress in the whole estate mortgaged." Judgment.

I will not interfere with the very moderate allowance made by the Master for compensation on the receipt and application of rents and profits as well as personal estate, amounting altogether to $133. She was appointed administratrix and acted as guardian, though

(*a*) 8 Can. L. J. 284.

1876. without any regular appointment, and is charged with what she received on both accounts, and is by law guardian by nature and for nurture, and though this did not give her a strict right it was some excuse to her for receiving the rents, and she has accounted for them. It may be regarded as an exceptional case.

Doan v. Davis.

I understand that there is no objection to the sum allowed for maintenance. It is moderate.

Judgment. The widow should not be charged one-third of the interest on the mortgage debt. This would follow from the position, which, in my opinion, she holds in regard to that debt.

The bill is for an account and for partition; the widow is entitled to her costs, and the other parties are entitled also to their costs out of the estate.

LINDSAY v. LINDSAY.

Dower—Mortgage—Costs.

Where in a suit for partition, a sale is ordered of an estate, subject to a mortgage, securing a debt of the ancestor, and in which his wife had joined to bar dower, the Master, before estimating the dower of the widow, should not deduct the costs of the suit; the widow's right in such a case being to have her dower out of the gross value of the estate.

The interest of the purchase money of the estate so sold commenced to run on the 31st of March, 1875, and the report of the Master bore date the 3rd of February, 1876. An appeal on the ground that the Master should have computed interest on the sum allowed for dower from the former date was dismissed with costs; the Court assuming that the value of the dower was ascertained at the date of the report.

Doan v. *Davis ante* p. 207, approved and followed.

This was an appeal from the report of the Master at Woodstock, by the widow of the intestate, because in ascertaining a lump sum for her dower in land mortgaged by the intestate, he had only allowed it on the

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value of her interest in the equity of redemption, while she claimed (1.) that she was entitled to dower in the value of the whole land, without deducting the amount of the mortgage; (2.) that the costs of the suit should not have been deducted from the purchase money before ascertaining her dower, and (3.) that interest ought to have been allowed on the amount of her dower from the day of sale.

March 3rd.

Mr. *Boyd*, for the appeal. Here the Master has deducted the amount of mortgage and also the costs of suit from the amount of purchase money realized for the estate, and has allowed to the widow dower in the balance only. As regards the heirs-at-law the widow is clearly entitled to dower in the whole purchase money, and it was so determined in *Sheppard* v. *Sheppard* (*a*); *Carrick* v. *Smith* (*b*); *Re McMorris* (*c*), and *Doan* v. *Davis* (*d*), recently decided by the Chancellor.

Argument.

The Master in the present case evidently followed the rule enunciated by the same learned Judge in *Campbell* v. *The Royal Canadian Bank* (*e*). That, however, was not a similar case to the present; there the widow was only entitled to equitable dower, the mortgage there being given to secure purchase money.

To shew that the costs at all events should not have been deducted he referred to *Higbie* v. *Westlake* (*f*).

As to the third ground of appeal he cited *Farley* v. *Starling* (*g*); *Matheson* v. *Smith* (*h*), also *Higbie* v. *Westlake*.

Mr. *Bethune*, contra. *Thorpe* v. *Richards* (*i*) and *White* v. *Bastedo*, in the same volume, shew that the

(*a*) 14 Gr. 174.
(*b*) 34 U. C. R. 589.
(*c*) 8 U. C. L. J. 284.
(*d*) *ante* p. 207.
(*e*) 19 Gr. 334.
(*f*) 14 N. Y. Rep. 481.
(*g*) 18 Gr. 381.
(*h*) 1 Rh. Id. Rep. 22.
(*i*) 15 Gr. 403.

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widow is not so entitled. The Imperial Statute 3 & 4 Wm. IV., commonly called Lord *Kingsdown's* Act gave the widow a right she did not before possess, and in view of this enactment the rule laid down in *Campbell* v. *The Royal Canadian Bank* would seem to be the correct authority to follow in the present case.

It does not seem unreasonable to charge her with her proportion of the costs of suit, for if she had been obliged to proceed at law to obtain an assignment of dower she would not receive costs unless the tenant refused to allow dower to be assigned.

As to the question of interest, it is really a matter of but very little importance; but it is submitted that the Court would have a right to assume that the Master, when making up his report, had taken everything into consideration.

March 15th. Judgment.

PROUDFOOT, V. C.—I understand that the mortgage was made by the intestate to secure a loan of money, and in such case the decision in *Doan* v. *Davis* (*a*) approving of the principle acted on by the late Master *In re McMorris* (*b*) covers the ground, and determines that the widow is in the position of a surety for the husband's debt, and is entitled to have the land exonerated from the debt,—or, in other words, that in ascertaining her dower the amount of the mortgage is not to be deducted. It was endeavoured to withdraw the case from the operation of this principle, by applying the rule contained in the 29 Vic., chap. 28, sec. 33, which provides that when a person dies seized of land subject to a mortgage, and shall not by will or deed or other document have indicated a contrary intention, the heir or devisee shall not be entitled to have the land exonerated out of the personal estate, but the land so charged shall, as between

(*a*) *ante* p. 207. (*b*) 8 Can. L. J. 284.

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the persons claiming through or under the deceased person, be, primarily liable to the debt.

But this section plainly applies to contests between the heirs or devisees on the one hand and the personal representatives on the other. The dowress does not claim *through* or *under* the deceased. He cannot by any disposition deprive her of her dower (*a*).

It was also contended that the Act giving dower in equitable estates only gave it in the equitable interest (*b*). That may hold where the wife had not an inchoate estate prior to the mortgage,—as, for instance, if the mortgage had been made before the marriage,—but does not seem to apply where the wife pledges her estate as security for the husband's debt.

In *Campbell* v. *The Royal Canadian Bank* (*c*) the mortgage was for purchase money, and the seisin was only momentary, which appear to be sufficient reasons for distinguishing it from *Doan* v. *Davis*. They are both decisions of the same Judge, and in the latter he expresses no intention to hold anything at variance with the former. But whatever opinion I might otherwise entertain, I consider myself bound by *Doan* v. *Davis*. I do not, however, see any reason for dissenting from it.

Judgment.

Another ground of appeal is, that the Master deducted the costs of suit before estimating the dower. The bill was for partition, or sale and division of the proceeds. Under similar circumstances in *Doan* v. *Davis*, the widow was given her costs out of the estate. The Master proceeded upon the ground that she had taken the benefit of the suit, and must take it *cum onere*. I do not see that she derives any benefit from the suit,—it does not appear that a sale was more for her benefit than an

(*a*) *Park* on Dower, p. 5. (*b*) Con. Stat. U. C., p. 852.
(*c*) 19 Gr. 334.

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assignment of dower. It was probably as much for the benefit of the other parties to get the land sold freed from her dower. It would thus bring a better price. I think on this subject the Master has come to an erroneous conclusion.

The last ground of appeal is, that the Master has not, but should have, allowed interest on the sum in lieu of dower from the time the purchase money bears interest. The interest begins on the 31st March, 1875, the report is dated the 3rd February, 1876,—and I assume that the value of the dower was ascertained as of the latter date, and that the Master took everything into account that could affect the value to that time, including the interest. He does not certify that the sum he fixes was the value of her dower on the 31st March, 1875, but on the 3rd February, 1876. This ground of appeal is overruled.

Judgment. The first two grounds of the appeal allowed with costs; the last overruled with costs.

1876.

CURTIS v. WILSON.

Suit transferred from law—Pleading—Practice—Administration of Justice Act.

A suit was transferred from the Queen's Bench under the Administration of Justice Act, which, on argument of a demurrer, proved to be defective for want of the assignee in insolvency as a party, there not being the necessary allegation in the plaintiff's pleadings to shew that the right of action had re-vested in the plaintiff; the Court, however, directed the cause to stand over in order to make the necessary allegation in the pleadings or to add the assignee as a defendant.

Demurrer.

The facts of this case are fully stated in the judgment.

Mr. *Delamere*, for the demurrer.

Mr. *Wells*, contra.

In addition to the cases mentioned in the judgment, counsel referred to and commented on *Bryant* v. *Beale* (*a*), *Nicholson* v. *Gunn* (*b*), *Dunn* v. *Irwin* (*c*).

Judgment.

BLAKE, V. C.—In this case a writ was, on the 5th day of February, 1869, issued out of the Court of Queen's Bench, on behalf of the plaintiff against the defendant to recover £100 15s. 5d. alleged to be due to the plaintiff by the defendant on a covenant in a chattel mortgage made by the defendant to the plaintiff. To this the defendant pleaded that the plaintiff made a voluntary assignment under the Insolvent Act of 1864, under which all his estate and effects passed to and became vested in his assignee; and the plaintiff replied that he had procured a deed of composition and discharge, to be duly signed and deposited, one of the terms of which was, that as soon as certain notes were deposited and moneys paid, the assignee should execute a deed of transfer and reconvey-

(*a*) 1 Jur. 511. (*b*) 35 U. C. R. 7. (*c*) 25 U. C. C. P. 111.

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ance to the plaintiff of his estate. The plaintiff alleges he deposited the notes and moneys, and that all conditions were performed and that the assignee handed over the estate, and, as a part thereof, the covenant in question, and that he, the plaintiff, held and was possessed of the said deed as and for his own proper use. To this replication the defendant demurred, and the demurrer was brought on for argument on the 6th of February, 1875, and on the 4th day of March following the Court rendered this judgment: "Transmitted to Chancery to be dealt with under Administration of Justice Act." On the 12th of April, 1876, the transformed action acquired sufficient vitality to cause itself to be again set down for argument, this time in the shape of a suit in this Court, and I am now called upon to dispose of this point of pleading, which is one not at all peculiar to the practice of Courts of Equity.

Judgment.

By the voluntary assignment the chattel mortgage in question was duly transferred to the assignee. By the deed of composition and discharge itself the instrument was not reassigned; on the contrary, in so many words, it provides that on certain things being done, the assignee is to transfer the property to the insolvent. Then in what way can it be said that this covenant is re-vested in the plaintiff? It cannot be by the delivery, and yet this is all on which, under this pleading, the plaintiff can rely to support his action. I think that the demurrer must be allowed, but that the plaintiff should have liberty to amend by adding the assignee as a party defendant, if he will not assign.

In *Ireland* v. *Wagstaff* (*a*), cited to me by the counsel for the plaintiff, the action had been commenced by the insolvent before the insolvency, and it was there only held that an action might be continued where the assignee consented to it, and did not intervene. It was

(*a*) 4 U. C. R. 231.

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not held that the plaintiff would have any right to commence such an action after his insolvency, nor to continue it adversely to the assignee.

In *Guinness* v. *Carroll* (*a*) it was taken for granted that the action was being carried on for the benefit of the estate; and, as it was an action on a judgment, it was looked on as a continuation of the former action, and was allowed to proceed. I do not think these authorities dispose of the point raised in this case.

I thought on the argument of the demurrer and then suggested to counsel, and still think, that the simplest mode of procedure would have been to have swept away the six pleas in which the defendant has swathed his defence, and the five replications by which the plaintiff has sought to conceal in ambush his position, and that the plaintiff should have, in half a dozen lines, set out his demand against the defendant, and he at the same length should have specified the reasons for not complying with it. The counsel for the parties thought otherwise, and so I allow the plaintiff, on payment of costs, to make what he can of the wordy warfare.

Judgment.

(*a*) 1 B. & Ad. 459.

1876.

MILLER v. VICKERS.

Devise subject to a charge—Practice.

Where a suit is brought to enforce the payment of an annuity issuing out of several parcels of lands it is not necessary that all the persons interested in these lands should be made parties; but where this was not done the Court directed the decree to give the defendants liberty to proceed by petition to add the persons whom they might consider liable to contribute to the claim of the annuitant; it being more reasonable that the questions involved should be litigated at the expense of the defendants than at the expense of the annuitant.

The rule applicable to mortgage cases where the legal estate is in the hands of several parties does not apply, as there the party seeking to redeem is entitled to a re-conveyance of the whole estate, and in that view the whole estate must be represented.

April 12th. The testator devised certain lands to one *John Bishop*, subject to a charge of £20 a year, in favour of the plaintiff, to be paid by *Bishop*. *Bishop* subsequently sold portions of the devised property to several purchasers, and the annuity of the plaintiff being allowed to fall into arrear she filed a bill seeking to enforce payment of her annuity against the defendants, who were owners of only part of the estate under *Bishop*. The defendants objected that the owners of the other portions of the estate should be joined as defendants, in order that all interested might contribute to the amount payable to the plaintiff.

Argument. Mr. *Boyd*, for the plaintiff, now moved for a decree in accordance with the terms of the prayer of the bill.

Mr. *Fitzgerald*, Q. C., contra. There is no personal remedy whatever given to the plaintiff. There is a mere charge created in her favour on the land to enforce which she must bring all persons interested in those lands, and therefore interested in seeing that the annuity is paid, before the Court. She would certainly be bound to do so in a mortgage case where the legal estate was in several hands: *Fordham* v. *Wallis* (*a*), *Attorney-*

(*a*) 10 Hare at 231.

General v. *Jackson* (*a*), *Miller* v. *Huddlestone* (*b*), *Robson* v. *Jardine* (*c*), *Young* v. *Hassard* (*d*). 1876.

Miller v. Vickers.

BLAKE, V. C.—*John Bishop* accepted the devises in the will, and thereby these lands became charged in his hands with the payment of the £20 a year given to the plaintiff by the testator, to be paid by this devisee. If all these premises were still held by *John Bishop*, the devisee, the plaintiff could proceed against any part of them she chose, although she might thereby waive her right at a future time to proceed against any other portion of the lands devised. In this case the defendants say they have certain rights over against the other owners of the premises. The plaintiff says first, "I have a right to proceed against any portion of the land I choose; and, second, in this case, whatever the ordinary rule may be, the other owners should not be added, as I admit I have no rights against them." I think, under these circumstances, the most convenient course to pursue will be, as the cause is now virtually being heard, to proceed against the present defendants, giving them full liberty to proceed by petition in this cause to add any persons whom they may think liable to contribute with them to the plaintiff's claim. I think it is more reasonable that these questions should be litigated at the expense of the defendants who seek to make these others liable, rather than at the expense of the plaintiff. I do not think the rule in mortgage cases assists—there the party redeeming is entitled from the mortgagee to a reconveyance of the whole estate, and in order to work out the rights of the parties, the whole estate must be represented. The costs of this application should be costs in the cause, unless the order referring it to the Judge who takes the paper, deals with them, in which case the provisions there made will be followed.

Judgment.

(*a*) 11 Ves. 365.
(*b*) 13 Sim. 467.
(*c*) 22 Gr. 420.
(*d*) 1 Dr. & War. 638.

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SWAN v. ADAMS.

Injunction—Discontinuing nuisance.

Although the fact that a nuisance has commenced will raise a presumption that the same will continue, still, where it was alleged that the nuisance complained of was caused by the discharge of refuse matter from the manufactories of the defendants, and it was shewn that no such refuse matter had been discharged by them for upwards of a year, they having closed down their manufactories during that period, and that if the nuisance was increasing at all it was not through the act of the defendants, The Court refused an interlocutory injunction restraining the further continuance of such nuisance.

P. granted permission to *W.*, an adjoining owner, to dig a drain partly on his land for the purpose of draining a pit on the lands of *W.* which had been in use for some years, and which it was alleged had created a nuisance.

Held, that *P.*, after having granted the permission and lying by so long was not in a position to obtain an interlocutory injunction restraining such nuisance, unless he could shew that the nuisance had increased of late beyond what it formerly was.

Statement. The bill in this cause stated that the plaintiff was the owner of a piece of land on the bank of the river Thames, in the township of London, acquired by him recently, on which were numerous natural springs of water rising out of the soil and running in small streams into the river. The plaintiff purchased the land for the purpose of erecting a tannery and of carrying on his business of a tanner there, and of erecting a dwelling house for a residence for himself and his family. He was induced to buy and to erect the tannery on account of the abundant supply of water obtainable from the said springs, and from the river, for the purpose of his trade and for domestic use. Large quantities of water were required for carrying on plaintiff's trade, and could be easily obtained from the springs and the river. The waters of the springs and of the river were naturally and continued to be, until polluted by the defendants as therein mentioned, pure and fit for use in the plaintiff's trade and for domestic purposes.

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The bill further alleged that the defendants occupied certain lands immediately opposite the plaintiff's lands, and abutting upon the north side of a concession road running between them and the plaintiff's land, and that they thereon carried on the trades or business of coal oil refiners and soap manufacturers. That the defendants discharged all the refuse matter from the said refinery and factory into a certain pit on the lands occupied by them, and the matter overflowed the pit and ran therefrom across the concession road into and upon the plaintiff's lands, and was discharged into the river above the plaintiff's tannery; that the refuse matter was so noxious and offensive as to pollute the waters of the river and render them unfit for use in the plaintiff's trade, as well as for ordinary purposes; that the refuse matter discharged into the pit also percolated through the soil and impregnated the water of all the said natural springs upon the plaintiff's lands, polluting them and rendering them at all times so noxious and offensive as to be wholly unfit for domestic and other purposes; that the plaintiff had applied to the defendants to abate the nuisance, which they promised to do, but, instead of abating, they had increased it to so great an extent that the plaintiff had been compelled to desist altogether from carrying on his business; and prayed for an injunction to restrain the defendants from so discharging the said refuse matter from their refinery and factory as to pollute the waters of the springs and river, and from using the refinery and factory otherwise so as to pollute the waters.

Statement.

The plaintiff moved for an interlocutory injunction in the terms of the prayer of the bill.

It appeared that the plaintiff had mortgaged the land to secure part of the purchase money to one *Pegler*, the vendor, and on it being objected that he was a necessary party, the counsel for the plaintiff said he was authorized to appear for him, and he was accordingly added as a co-plaintiff.

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The affidavits used upon the motion shewed that the defendants *Adams* and *Mahon* occupied the land across the concession road directly opposite the plaintiff's. They were partners in the business of oil refiners until 15th April, 1875, when they leased their property to *Fitzgerald*, *Spencer*, *Hodgins*, *Duffield & Minhinnich*, for a period of fifteen months, which had not expired. But they occupied the premises with the permission of the lessees, and carried on the manufacture of lubricating and machine oils.

The defendant *Wilson* occupied land adjoining that of *Adams & Mahon*, and carried on the business of oil refining till the 1st July, 1874, and on the 5th March, 1875, he leased it for a term not yet expired to *Fitzgerald* and others, who leased from *Adams & Mahon*, and he occupied the premises with the consent of the lessees, and carried on the business of soap manufacturing.

Statement.

The pit mentioned in the bill was situated partly on *Wilson's* and partly on *Adams & Mahon's* land.

The defendant *Wilson* stated that his oil refinery had not been worked since 1st July, 1874; that it was completely shut down, and there had been no discharge of refuse therefrom since then.

The plaintiff admitted that his case failed in regard to the soap manufacturing, and as to *Wilson*, therefore, he was sought to be made liable for having originally assisted in creating the nuisance and in permitting it to continue.

Adams & Mahon alleged that the refuse from their manufacture of machine and lubricating oils was of a heavy character and such as would not percolate the soil, but on the contrary remained in solid and hard masses

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on the land occupied by them. They denied that they had in any way caused the nuisance, as they had not for nearly two years manufactured any oil from which there was a refuse which would or could percolate the soil; and the pond contained nothing but water and a small quantity of oil floating on the top. The oil would collect to the same extent in the pond whether their refinery was in existence or not, as their land was percolated with oil from refineries north of theirs.

It was shewn that the locality in which the plaintiff's and defendants' properties were situate was part of the oil refinery district of the city of London. It lies north and north-east of the plaintiff's land, and had, for ten years back, been used for refining oil and the other industries connected therewith, and drains into the river. In the opinion of Mr. *Peters*, a civil engineer, the cause of the pollution of the springs was the drainage from that district, and the percolation through the soil; and that the whole of the said district must by this time be entirely polluted so badly as to render it almost an impossibility now to remedy the evil; that the Thames is the natural sewer for the city of London and adjacent country. Mr. *Tracy*, a P. L. S., who had been long acquainted with the locality gave similar evidence.

Statement.

The evidence of the defendants causing the nuisance was the affidavits of the plaintiff and of *Smith* and of *Lamb* —principally swearing to admissions by the defendants. The plaintiff stated that part of the said refuse matter, an oily substance which affects the said springs and the surface of the water of the river Thames, flowed at all times from the said pit. Other refuse matter, that which sank in the waters of the river Thames, was discharged from the refinery and factory, and ran from the said pit into the said river at intervals only. He further said he saw *Mahon*, who said that the matter causing

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the pollution must go somewhere, and that he did not know what they would do about it. The plaintiff pointed out to him that it might be removed by digging a short drain into Adelaide street; that *Mahon* said he had not thought of that, and something would have to be done. The plaintiff stated also that he saw the defendant *Adams* about it, who admitted the nuisance and promised to abate it; he thought the plan suggested to *Mahon* was a good idea, and he would see about it. The plaintiff further stated that the refuse matter was discharged by the defendants in a manner entirely without regard to the injury it might occasion to their neighbours. No attempt was made to prevent the same being a nuisance. It was carelessly emptied into the pit, and allowed to run upon the plaintiff's lands without any regard to his interests. He further said that the defendant *Wilson* saw him and contended that he had abated the nuisance so far as he was concerned; that there was no offensive matter running from his factory; but the plaintiff said at that very time and since, it was and had continued to be discharged from his factory, and to run down upon plaintiff's lands. The plaintiff pointed this out to him and he was forced to admit it, but said it must be occasioned by a leak.

Statement.

Justus Smith swore to admissions by *Wilson* that the nuisance was in part caused by him, and that he would have a drain constructed to Adelaide street. He said also that *Adams* admitted he and *Mahon* contributed to the nuisance. *William Lamb* said the pollution of the waters was wholly or in a great part by the refuse matter of the refinery and factory.

The plaintiff's solicitors also wrote to the defendant *Wilson*, that the plaintiff had instructed them that *Wilson* was running the refuse from his ashery on to plaintiff's land, and spoiling the water. To which *Wilson* replied that he had abated the so-called nui-

sance. It was shewn that it was discharged there by the leave of Mr. *Pegler*, who professed to be the former owner of the land claimed by *Swan*. 1876. Swan v. Adams.

William Stokes, in the employment of *Adams & Mahon*, gave the same account as they did of the refuse from the manufacture carried on by them now, as being hard, not liquid, but accumulated in large masses on the land. He also spoke of the whole soil of the neighbourhood as being completely saturated with oil and acid from oil refineries and acid works; that *Adams & Mahon* had for more than a year ceased to manufacture burning oil, from which alone the refuse was liquid.

The evidence of *Thomas Wright* was to the same effect.

The defendant *Wilson* denied the conversation spoken of by the plaintiff, or that he ever admitted that there was any discharge from his factory. Statement.

A number of witnesses swore that the plaintiff's tannery had not been stopped, and that he continued to work it.

Ira V. Thompson, a former partner of *Wilson*, stated that he received permission from *Pegler*, who professed then to be owner of the land south of *Wilson's*, to cut the drain from the pit mentioned in the bill. *Pegler* said that he gave *Thompson* permission two or three years ago to cut a drain across his lands, provided he dug a deep drain and covered the same over.

Mr. *R. M. Meredith*, for the plaintiff, now moved for an injunction in the terms of the prayer of the bill. The plaintiff here establishes a clear right, and gives reasonable evidence, at all events, of a violation of such right. If doubtful, however, the Court will be guided in exercising its discretion of granting or refusing an

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injunction by a comparison of injury to be inflicted or sustained by the one party or the other, by the granting or refusal of the injunction. The plaintiff's right is clear and undoubted to have the water in its accustomed purity in the river and springs. The pond and drains undoubtedly cause an injury to the plaintiff, and these being on the lands of the defendants it is their duty to remedy the evil. In fact, this is the common case of a party polluting the waters of a stream, the affidavits, we contend, establishing that clearly. The defendants are responsible for the nuisance on their land, though not created by them; and it is no defence to them to be able to shew that other persons are also committing the same nuisance to the injury of the plaintiff: *Kains* v. *Turville* (*a*), *Radenhurst* v. *Coate* (*b*).

Mr. *Boyd*, Q. C., and Mr. *Gibbon*, contra, submitted that *Pegler* could not be heard to complain after having sanctioned and permitted the cutting of the drain complained of: *Cairncross* v. *Lorimer* (*c*).

Mr. *R. M. Meredith*, in reply, referred to *Brown* v. *Russell* (*d*), *Thorpe* v. *Brumfitt* (*e*), *McAuley* v. *Roberts* (*f*), *Attorney General* v. *Colney Hatch* (*g*), *Goldsmid* v. *Tunbridge* (*h*).

July 7th. Judgment.

PROUDFOOT, V. C.—[After stating the facts as above set forth.] The complaint in the bill is that the defendants are carrying on the trade of coal oil refiners and soap manufacturers, and that they discharge their refuse into the pit, and suffer it to percolate through plaintiff's land; and the prayer is, to restrain the defendant's

(*a*) 32 U. C. R. 17.
(*b*) 6 Gr. 139.
(*c*) 7 Jur. N. S. 149.
(*d*) L. R. 3 B. R. 251.
(*e*) L. R. 8 Chy. 650.
(*f*) 13 Gr. 565.
(*g*) L. R. 4 Chy. 146.
(*h*) L. R. 1 Ch. 349.

from so discharging the said refuse matter from their said refinery and factory as to pollute the said natural springs or the waters of the river. 1876. Swan v. Adams.

The case wholly fails in showing any discharge from the soap factory, and in that respect was abandoned. And I think the fair result of the evidence is, that there is no present discharge from the oil refineries into the pit, and that there has been none for more than a year as to one, and for more than two years as to the other, the refuse being accumulated in hard masses on the land.

I place very little reliance on the alleged admissions by the defendants. The evidence of the plaintiff is, as regards *Wilson's* admissions, so wholly overborne by the witnesses who swear to the fact of no discharge from his factory, that it weakens very much the confidence one would otherwise feel inclined to place in the plaintiff's affidavit. Admissions besides are so liable to misconstruction—a slight variation in a phrase or sentence may completely change their effect,—and, supposing the plaintiff to have told the truth as to his understanding of the conversation, it is clear as to part at least that he thoroughly misunderstood it. The letter from *Wilson* to the plaintiff's solicitors is no admission of causing a present nuisance. I imagine that both he and the other defendants, having formerly used the pit as a receptacle for their refuse, may have thought themselves under some obligation to prevent the plaintiff being annoyed, and stopped or endeavoured to stop the drains from the pit. Judgment.

The bill does not complain of the nuisance as caused by suffering offensive matter to remain stagnant on the premises, but of the present discharge and overflow from the pit, and of the noxious matter percolating through the soil, and only seeks to prevent the discharge into the pit of the offensive matter.

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And considering that any discharge by the defendants into the pit was made more than a year since; that the whole soil in the neighbourhood is thoroughly saturated with the offensive discharges from other refineries, that these are said to percolate into the pit and keep up the supply of its contents; that it is not shewn, and indeed it would appear otherwise, that the noxious matters deposited a year or more since have remained in the pit, and are the proximate cause of the injury to the plaintiff, I do not think this a case for an interlocutory injunction.

Upon the bill as amended *Pegler* is a party plaintiff, and I apprehend that his conduct, not in giving a license to dig a drain only, but in lying by so long with knowledge of the pit, prevents him from asking an interlocutory injunction, unless it were shewn that the nuisance had increased of late beyond what it was formerly. This is not shewn; indeed the reverse appears to be the case: *Williams* v. Earl of *Jersey* (*a*), *Joyce* on Injunctions, 580, 1033; *Cairncross* v. *Lorimer* (*b*).

Judgment.

In *Goldsmid* v. *The Tunbridge Wells Improvement Commissioners* (*c*), *Turner*, L. J., speaking of injunctions in case of prospective nuisance says: "I am satisfied upon the evidence that the nuisance in this case has been and is increasing, and in all probability will continue to increase; and although I am not prepared to say that, if this case rested upon prospective nuisance only, enough is proved to warrant the interference of this Court, I am by no means disposed to think that where some degree of nuisance is proved to exist, and to have been increasing, the Court in determining whether it should interfere, ought not to have regard to the prospect of its further continuance and increase. The interference of the Court in cases of prospective

(*a*) Cr. & Ph. 91.
(*b*) 7 Jur. N. S. 149
(*c*) L. R. 1 Chy. 349.

injury very much depends, as I apprehend, upon the nature and extent of the apprehended mischief, and upon the certainty or uncertainty of its arising or continuing ; and the fact of a nuisance having commenced raises a presumption of its continuance."

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But that reasoning is quite inapplicable to a case such as this, where the active participation of the defendants in contributing to any nuisance has ceased for more than a year, and if it is increasing at all, it is not through their act; but the evidence does not satisfy me that there is in fact any increase.

A number of other questions were discussed, which in the view I take of the case made by the bill and of the evidence in support of it, it is not necessary to discuss.

Judgment.

The motion is refused, with costs.

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The Edinburgh Life Assurance Company v. Allen.

Appeal from Master—Trustee for sale—Stated account—Occupation rent.

A trustee of lands authorized (*ante* vol. xviii. p. 426,) to sell, and, amongst other things, to retain and pay sums due and owing to himself by the settlor, and to pay the balance to the settlor, mortgaged his interest to the plaintiff, giving covenants for title and further assurance; and then by arrangement with the settlor the trustee was to be entitled to pay himself and his partners for goods and advances made after the mortgage and afterwards becoming entitled to the whole partnership estate, it was *held*, that the further charge enured to the benefit of the mortgagee.

A stated account set up in the answer may be insisted on in the Master's office, although no evidence was given of it at the hearing; being a matter of account which under the General Orders the Master has a right to investigate without special reference.

A person who does not occupy and has no power to lease, cannot be charged an occupation rent.

A trustee for sale having made several agreements for sales, which were rendered abortive by the refusal of the widow of the settlor to bar her dower: *Held*, that the trustee was not liable for deterioration of the property, the decrease in value not having occurred through any default of his.

Where the widow of a settlor, who had a claim for dower, had obtained possession of the trust estate, the costs of an action of ejectment to recover possession were allowed out of the estate.

Oct. 15th, 1875.

Statement.

This was an appeal from the report of the Master by the plaintiff.

Mr. *Leith* and Mr. *Moss*, for the appeal.

Mr. *Hodgins*, Q.C., and Mr. *Black*, contra.

The grounds of appeal and views urged by counsel appear sufficiently in the judgment.

In addition to the cases mentioned in the judgment, *Lunday* v. *McCulla* (*a*), *Middleton* v. *Pollcok* (*b*),

(*a*) 11 Gr. 368.

(*b*) L. R. 20 Eq. 29.

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Taylor v. *Taylor* (*a*), *Sander* v. *Heathfield* (*b*), *Watson* v. *Mid-Wales Railway Co.* (*c*), *Brownlee* v. *Cunningham* (*d*), *Morrison* v. *Robinson* (*e*), were referred to.

Jan. 12th.

PROUDFOOT, V. C.—The plaintiffs in this suit seek to realize the interest of *John W. Gamble* under a trust deed made by *James Allen*, the father of the defendant, to *Gamble*, dated the 19th July, 1855, *Gamble* having on the 10th November, 1860, made a conveyance absolute in form to the Assurance Company, but subject to a defeazance, by a separate instrument of the same date, to become void on payment of £700 sterling and interest.

The bill was filed by the Assurance Company and *Gamble* as plaintiffs, and on *Gamble's* death it has been revived by making his personal representative a plaintiff against the defendant as administratrix of *Allen*.

Judgment.

The decree, dated 21st January, 1873, declared the Assurance Company entitled to whatever *Gamble* was entitled to under the trust deed of 19th July, 1855, and directed an account to be taken of the dealings between *Gamble* and *Allen* under the trust deed, and to take an account of the amount due by *Allen's* estate to *Gamble*.

On the 5th December, 1861, *Gamble* and *Allen* had a settlement of accounts, when *Allen* signed an account acknowledging that he had received from *John W. Gamble* the money, merchandize, and other articles mentioned in it, and that it was just and true. This account shewed a balance of $4,096.30 to be then due from *Allen* to *Gamble*.

(*a*) L. R. 20 Eq. 297.
(*b*) 44 L. J. Ch. 113.
(*c*) L. R. 2 C. P. 593.
(*d*) 13 Gr. 586.
(*e*) 19 Gr. 480.

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The validity of the mortgage to the Assurance Company of 10th November, 1860, was established in a proceeding under the Quieting Titles Act, reported 18 Grant 425, where most of the facts are to be found, and the evidence there taken was read before the Master in this suit; and that the trust deed of 19th July, 1855, operated a conversion of the property was established in a suit of *Allen* v. *Gamble*, on demurrer, reported in 3 Chy. Ch. R. 105.

In proceeding upon this decree in the Master's office the plaintiffs relied upon an agreement between *Allen* and *Gamble* after the 19th July, 1855, the date of the trust deed, that advances of money and goods made by *John W. Gamble* should be a charge upon the property or paid out of the proceeds of the sale—and upon the settlement of accounts in December, 1861, as ascertaining the amount.

Judgment.

The Master has held that if this agreement and settlement were made they were subsequent to the mortgage to the Assurance Company, and could not pass by it,—and that the evidence shewed the agreement was with *Gamble & Co.*, and therefore an assignment by *Gamble* alone would not pass the interest of the Company.

Gamble & Co. dissolved partnership in 1862 or 1863, and *Harvey*, *Gamble's* partner, assigned to him all his interest in the firm. The Master also charged *Gamble* with an occupation rent, refused to allow him certain expenditures, and reported that the property was not sold and was deteriorated through *Gamble's* negligence; and he reported that there was due to *Gamble* under the trust deed, and to which the Assurance Company was entitled, the sum of $9.99 for principal and $3.10 for interest.

The plaintiffs assign thirteen reasons of appeal, of

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which the 7th was abandoned,—the first 6 and the 8th and 9th refer in various shapes to the disallowance of the settled account and of the items of which it was composed, and also to sums not allowed for taking care of the property and of obtaining possession of the property; the 10th and 11th because the plaintiffs were charged with an occupation rent, and for a time when they were not in possession; the 12th and 13th, because the Master certified that the lands were not sold, and that they have deteriorated in value through *Gamble's* neglect and mismanagement.

The Master rejected the account stated, on the ground I have already stated, viz., that the account appears to have been with *Gamble & Co.*, not with *Gamble* alone, and that being subsequent to the deed to the Assurance Company could not pass under it. The counsel for the defendant urgently pressed that the evidence established *Allen's* incapacity from his dissipated habits to settle such an account, and that I ought to consider it invalid on that account. But the question of *Allen's* capacity on 19th July, 1855, and in May and June, 1867, was decided in the proceedings under the Quieting Titles Act, (18 Gr. 425) and the learned Queen's Counsel who sat for the Vice Chancellor on that occasion, considered that *Allen* was also of sufficient capacity when he signed the acknowledgment of 5th December, 1861. It was said that this last was not in issue on that occasion, but it was necessarily involved in the investigation of his capacity at a later period, the allegation being that he had become incapable from long indulgence in intemperate habits. The evidence used on that occasion I have read, together with some further depositions, as well as the doubt expressed by the Master, but the impression made on my mind by it is the same as was arrived at by the acting Judge at that time.

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Had it been otherwise, in the absence of any decided additional evidence establishing incapacity, I would have felt bound to adopt his conclusion on the matter of fact; and I find no such evidence here. Thus Mrs. *Allen* on examination before the Master's clerk says: "When *Allen* was sober he was quite capable of making a bargain;" and *Giles* on examination before the Master, says: "I did not see account *J. W. G.* signed. I remember *Allen* being in the store the day it was signed. *Allen* told me he had been settling up with Mr. *Gamble*, and giving an acknowledgment of his account. He was perfectly sober!"

This question of incapacity would have assumed a much more serious aspect if the account were shewn to be incorrect. But no such charge is made; it is conceded that the evidence of the goods being furnished was quite sufficient to justify a jury in finding the amount to be due from him. This puts an end to the question of undue influence, as the agreement only secured a just debt out of the debtor's property.

Judgment.

Considering the question on the grounds of the Master's decision, I find that by the deed of the 10th November, 1860, *Gamble* grants the land to the Assurance Company in the old form of conveyances, and covenants that notwithstanding any act of his he had an estate in fee simple, and that the Company might enter and hold possession and enjoy and take the profits without any let, suit, &c., of *Gamble* or those claiming under him, and gives a full covenant for further assurance.

Any estate or interest which *Gamble* might subsequently acquire in the lands, not through the Assurance Company, would enure to their benefit. They would be entitled to hold it as an additional security for

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the loan. The class of cases, of which Doe *Irvine* v. *Webster* (*a*) is an example, establishes that a subsequent *estate* acquired by *Gamble* would feed the estoppel created by the deed; and I see no reason why the same reasoning should not apply to an additional *charge*. The covenant for further assurance is, that *Gamble* and his heirs, executors, and administrators, and every person having or claiming any estate, right, title, or interest, either at law or in equity in or out of the lands, shall make, do, and execute all such further and other lawful acts and deeds, &c., for the better and more absolutely conveying and assuring the said lands and premises to the Assurance Company as shall be devised by the Company, &c. This language is wide enough to include a charge upon the land subsequently acquired by *Gamble*, and confer on the Company a right to enforce a conveyance.

Judgment.

Then did *Gamble* acquire any subsequent interest under an agreement with *Allen*? *Gamble* was examined, and says "That before the articles in the account were got *Allen* understood they were to be paid for out of the proceeds of the farm when sold under the trust deed. I would not have given him credit on any other terms. When I say it was understood that the advances to *Allen* were on the faith of the trust deed, I mean it was agreed between us. I told *Allen* that what he got must be so paid and he agreed to it." *Giles*, a salesman in *Gamble's* employment from 1857 to 1863, says that *Allen* on several occasions told him "that the goods he was getting were to be paid for out of the proceeds of the farm when sold under the trust deed. He said Mr. *Gamble* had his farm, and that was how he was getting things."

Wilson, another salesman in *Gamble's* employ from 1854 to 1861, says that *Allen* got goods on credit.

(*a*) 2 U. C. R. 224.

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Wilson understood from him he was getting the goods on the strength of the property he had. He used to say when getting things he wished he had the place sold, and then he would have the money in his own hands.

Harvey, Gamble's then partner, says, "I knew that after the date of the first deed *Allen* and his wife got goods and money from *Gamble*, on the understanding that they were to be paid for out of the proceeds of the sale of *Allen's* property. I recollect this distinctly. I had refused goods and money to *Allen*, and he always answered that his place was good for it. I have heard from both *Allen* and *Gamble* repeatedly that this property was to be sold under the trust deed, and whatever goods or money were supplied to *Allen* or his family after the trust deed were to be paid for out of the proceeds of the sale."

Judgment.

This evidence establishes beyond all question that the goods and advances were to be paid for out of the proceeds of the sale under the trust deed.

But it is said that these goods were sold and money advanced by *Gamble & Co.*, not by *Gamble* alone, and could not pass to his assignee. The account is made out as an account with *Gamble & Co.*, and lends colour to the argument. There are several answers to this which appear to me satisfactory. *Gamble* held the property in trust for *Allen* and was directed by him to pay out of it advances and credits by *Gamble & Co.*, which would not have been made or given except upon the faith of that direction. He, thereupon, became a trustee for the firm of *Gamble & Co.*, and in such a manner that the trust was irrevocable by *Allen*. On the subsequent dissolution of the partnership in 1862 or 1863, the right to this debt became vested in *Gamble*. He held in trust for himself, and his right passed under the deed to the Assur-

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ance Company. Another answer is found in the form of the acknowledgment at the foot of the account. By this *Allen* acknowledges the receipt from *Gamble alone*, of the items of account. *Harvey*, *Gamble's* partner, tells us that he repeatedly refused to give goods to *Allen*; he mentions one instance in particular in which he refused him a suit of clothes, as his account was large, when *Allen*, after saying that *Gamble* had his property and would be able to get paid when he sold it, went for *Gamble* and brought him to the store, and *Gamble* told *Harvey* to "give *Allen* what he wanted and we would get paid for it." *Allen* was present when this was said, and got the clothes. This, together with the receipt, shews that, although the account was kept in *Allen's* name, *Gamble* was looked upon as the paymaster of the firm, and that the advances were really made upon his credit. But, however that may be, neither *Allen*, nor those claiming under him, could be heard to say that this was not so; unless a case were made for reforming the acknowledgment, which is not done.

Judgment.

Hitherto I have been discussing this matter as if the Assurance Company were alone plaintiffs; but it must be remembered that *Gamble's* representative is also a plaintiff, and no dispute arises between them as to what passed to the Assurance Company. If *Gamble* was entitled to hold for his own benefit under the trust deed as enlarged by the subsequent agreement, all *that* is by this decree transferred to the Assurance Company. So that the question is as to what *Gamble* was entitled. There seems to me no reason to doubt, upon the evidence, that *Gamble* was entitled to be paid all these sums out of the proceeds of the sale under the trust deed.

It was pressed upon me that the bill charging an express agreement between *Allen* and *Gamble* subsequent to the trust deed, that money paid for, and goods sold to, *Allen* should be a charge on the land, and the answer

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denying it, and the cause being heard on bill and answer, and no notice taken of it by the decree; that the plaintiffs are precluded from making any such claim; that it is not matter of account merely but a distinct substantial agreement.

By our general orders very large powers are given to the Master, and he is authorized generally in taking accounts to inquire and adjudge as to all matters relating thereto as fully as if the same had been specifically referred. Reg. Gen. 220 (1853). In *Stirling* v. *Riley*, (*a*) Esten, V. C., says that a defendant may shew whether a mortgage was made for a specified sum, or to secure a floating balance; whether he has stated it in in his answer or not.

In *Inglis* v. *Gilchrist* (*b*) upon an ordinary decree for redemption the Master was enabled to admit evidence of a new loan on the security of the premises, substituted for one that had been paid.

Judgment.

In *Wilson* v. *Cossey* (*c*) the defendant, by answer, claimed that a mortgage was a security for a larger sum than stated in the bill and to secure future advances. *Mowat*, V. C., stated the rule to be that he must take the answer to be true on all points on which by the practice of the Court the defendant could have given evidence if the plaintiff had replied to the answer and gone to a hearing in term. No cases seem to have been cited, and the decision is at variance with the rule in *Stirling* v. *Riley* (*d*) and *Inglis* v *Gilchrist* (*e*). I prefer the rule in *Stirling* v. *Riley* and *Inglis* v. *Gilchrist*, as more in conformity with the practice of the Court and the enlarged powers of the Master under our order. Had the rule been stated that the answer must be taken to be

(*a*) 9 Gr. 343, 346.
(*b*) 10 Gr. 301.
(*c*) 14 Grant 80.
(*d*) 9 Gr. 346.
(*e*) 10 Gr. 301.

true on all points of which the defendant *must* give evidence if replied to, it would have been more accurate. There is no doubt that many matters may be, and are, daily adjudicated upon at the hearing which might be left for disposal by the Master. This is sometimes a convenient and proper proceeding and tends to save the expense of an appeal. Thus on a bill for a partnership account, where the right to an account is admitted by the defendant, but a claim is made for some special allowance—this has been investigated at the hearing, though it need not have been. Many other instances might be referred to establishing the right of the Court to decide in the first instance on matters which could be brought before the Master on an ordinary decree.

In *Neil* v. *Neil (a) Mowat*, V. C., held that a defendant setting up a stated account in his answer, need not prove it, but was entitled to an inquiry as to the stated account. The defendant, I apprehend, need not have set up such a defence by answer, nor need an inquiry have been given him. He had a right under the general order to rely for the first time upon it in the Master's office. No stronger example of the Master's powers can be given than his authority to inquire as to wilful default and neglect upon an ordinary decree. The decree for an account, and for an account with such an inquiry were totally distinct decrees. *Sleight* v. *Lawson (b)*. Yet under our orders, under an ordinary decree, such an inquiry may be prosecuted. *Carpenter* v. *Wood (c)*. I conclude, therefore, that as neither party need have given evidence of the agreement, if carried to a hearing, the plaintiff is not precluded from insisting upon it, as enlarging the effect of the trust deed, and moulding the rights of the parties under it.

Judgment.

The next ground of appeal is that regarding the

(a) 15 G. 110.
(b) 3 K. & J. 282.
(c) 10 Gr. 354.

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charging the plaintiffs with an occupation rent, and for a time when they were not in possession.

This is the most stringent mode of charging trustees or persons having possession of another's property, as it amounts to making them responsible for wilful default and neglect. Here the trustee had no power by the deed to rent. If he actually occupied the place he would properly be chargeable in this manner. But if he did not occupy, and rented the place, or if it were vacant, he ought only to be charged with the rent received, unless the rent were small by his default. Charging as an occupant a person who did not occupy, is equivalent to saying that he ought to have rented, and might have rented, the land, and did not. I do not understand how that can be affirmed of one who had no power to rent. I shall state a little further on the reasons why I do not think the plaintiffs were guilty of default, and I therefore think the Master has miscarried in charging an occupation rent.

Judgment.

The last matter of appeal is because the Master has certified that the lands were not sold, and have deteriorated in value, through *Gamble's* neglect and mismanagement.

It seems that various agreements were made by *Gamble* to sell—five in all—which proved abortive because Mrs. *Allen* would not release her dower. It is said she was always ready to release her dower, and evidence is given by a number of witnesses, of declarations by her to that effect. But there is also evidence that on two occasions, when offered what she had previously asked, she refused it, and that she is of a capricious and variable temper.

Gamble's position as trustee was a hazardous one. *Allen* had not authorized the allowance of a specific

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sum for dower, and if *Gamble* gave too much he would have been responsible for the excess. The *Allen* family was not a harmonious one; they did not live happily. Indeed I think *Allen* did not live at home. This may, and probably did, arise from his own fault, but it was a reason for the trustee being careful of his dealings with the property. That he refused to comply with Mrs. *Allen's* terms out of spite or self-will is almost incredible, considering the large interest he had at stake, the money due to him to be paid out of the proceeds of the sale, the want of which appears to have cramped him in his business. And when at last he did accede to her proposal, and the money was tendered, she drew back, demanded a larger sum, and made the impression on the mind of those engaged that she would not accept any reasonable offer. The Master has relied upon a release of dower signed by her found among the papers in consideration of £25 in hand, and £24 a year, charged on the land, for her life. But this comes from her own possession, and never seems to have been delivered. Mr. *Boyd*, her solicitor, who acted for her in reference to her claim for dower, and negotiated with Mr. *Clarke Gamble* for the purchase of her dower, says that offers were made to her, gradually increasing from one or two hundred dollars up to $1,200. For this sum he got a check, but she refused to accept and wanted $130 more. She agreed to take each sum as it was offered, but on consideration she afterwards declined. Mr. *Clarke Gamble* proves an agreement with Mrs. *Allen* to take £300 for her dower; that he prepared a release and took the money and the release to her for execution, when she declined to execute it, assigning no reason. Various other efforts were made to get a release with a like fruitless result. It is said she wanted to get a charge on the land for the sum. No purchaser would be bound to submit to such a charge, and it cannot be a misconduct on the trustee's part that he could not get them to do so. One instance is given in which *Matheson*,

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one of the purchasers, was willing to allow her dower if £300 was left in his hands to meet it. I suppose this to be the occasion referred to in the evidence of Mr. *Clarke Gamble*, who says: "I believe all the sales fell through from the utter impossibility of making any arrangement with Mrs. *Allen* for her dower. She was a woman of violent temper. She threatened *Orr* if he had anything to do with the place. There was a specific agreement with Mrs. *Allen*, made at my office, to pay her £300 for her dower. She consented to take £300. I prepared a release and took the money with me and the release to the house of a Mrs. *Byers*, at the corner of Church and Stanley streets, where she was staying. I produced the money and the release for her execution. She then declined to take the money or execute the release. She assigned no reason. I could do nothing with her. There was subsequently a sort of agreement to give her £400. This money was handed to Mr. *John Boyd* to give her. He returned it, saying he could do nothing with her. Upon one of the treaties for sale one of the conditions was that a mortgage should be given for £400, the interest to be paid Mrs. *Allen* half yearly during her life, and at her death the principal to be divided among her unmarried daughters. She agreed to this, but afterwards backed out."

Judgment.

Mr. *Boyd* only speaks of having got a check for $1,200 to pay Mrs. *Allen*. On this subject I think Mr. *Gamble* more likely to have a distinct recollection, as he acted for Mr. *J. W. Gamble* in all his endeavours to dispose of the land, while Mr. *Boyd* seems only to have been concerned in this one negotiation, and it would not likely make so deep an impression on his memory.

Harvey, another witness, says: "I have heard Mrs. *Allen* talk of her dower, and that she would take £300 for it, and she agreed to release it for that amount at

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that time, and Mr. *Gamble* was willing to give it her. *Gamble* and she talked this matter over in my hearing. I believe she was a very changeable person, changing her mind from day to day. I have heard her say she would never bar her dower. I have heard her assign as a reason for not barring dower that she was going to live on the place herself."

Mr. *Leith* says, that "in 1866 before he took possession I offered Mrs. *Allen* her dower on behalf of the Company. She wanted some ridiculous sum. She came to me and said she was entitled to dower, and I wanted her to take it. She wanted money in lieu of her dower, and named so large a sum that it was of no use to talk of it. I can't remember the sum she named."

Judgment.

There is no conflict of evidence so as to bring the case within *Day* v. *Brown* (*a*). One class of witnesses swears to Mrs. *Allen's* expression of her readiness to bar her dower: the other class to her refusal to do so when money offered. My conclusion from a perusal of the whole of the evidence is, that the failure to sell resulted from the unreasonable conduct of Mrs. *Allen*; that the five attempts to sell were defeated from that cause; that *Gamble* did all that could be required from a trustee in endeavouring to effect a sale, and that he was in no default in not being able to effect it. If the place has deteriorated, and if the rentable value has decreased, I think it was not owing to *Gamble's* fault.

Under the 9th ground of appeal the plaintiff claimed the costs of actions of ejectment brought to turn Mrs. *Allen* out of possession. Judgment was obtained and a writ of possession executed in the first, and the Company leased to tenants for a short time, but Mrs. *Allen* turned the last tenant out of possession, and took possession her-

(*a*) 18 Gr. 681.

1876. self. The last action was brought against her so as to be in readiness to give possession if the place was sold. Judgment was obtained, writ issued, but not executed, Mr. *Leith* says "because I feared Mrs. *Allen* would again turn out any person I might put in."

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I think these costs should be allowed. There seems to have been some mistake as to bringing the bills into the Master's office. Defendant's counsel say they were never brought in; it is reasonable the plaintiffs should have an opportunity of rectifying their mistake.

Judgment.

Crawford v. Lundy.

Will, construction of—Costs—Separate counsel for persons in same interest.

A testator bequeathed an annuity of £50 to his wife and another of £40 to his daughter, and after other bequests and devises he proceeded: "I give, devise, and bequeath to my executors hereinafter named, their heirs and assigns for ever, the [naming certain lands in Chinguacousy and a house and lot in Clinton], upon trust for the benefit of the several devisees hereinbefore and hereinafter mentioned. First, to sell and absolutely dispose of my said village lot and house in Clinton, and invest the proceeds for the benefit of my four grandchildren hereinafter named; also, to collect the balance due upon a certain mortgage made by one *Joseph Curley* and wife, and invest the same for the benefit of my said grandchildren. Second, to lease the said lots or farms [in Chinguacousy], and to keep the same leased out for ever, and the said lands in no case to be sold or mortgaged; the rental of the said farms, after paying thereout the said annuities of £40 and £50 to my daughter and to my wife as hereinbefore provided, to be held in trust by my said executors for the benefit of my four grandchildren hereinafter named, and to be invested for the said grandchildren and allowed to accumulate for the period of twelve years from the day of my decease, and then to be paid over to the devisees entitled thereto and thereafter to become payable to said devisees annually. I give, devise and bequeath unto my grandchildren [naming them] the rentals issuing out of the said farms in Chinguacousy; the moneys arising out of the sale of my house and lot in Clinton, and the balance due or to grow due on the mortgage made by *Curley* and

his wife to me, in equal parts, share and share alike." The will contained a residuary clause, as follows: "I give, devise, and bequeath to my executors hereinafter named all the rest, residue, and remainder of my real and personal estate, to be by them turned into cash and invested for the benefit of my said grandchildren hereinbefore named, subject, however, to the maintenance and support of my wife and daughter *Sarah* for one year from the day of my decease, without reference to and over and above and beyond any provision hereinbefore made for them or either of them." 1876. Crawford v. Lundy.

Held (1) that the widow and daughter were not entitled to any estate in the lands in Chinguacousy; and that the executors held the same as trustees, subject to the said annuities, for the benefit of the four grandchildren in fee, who had a right to call upon the trustees to convey in such manner as they saw fit. (2) That the power given by the will "to keep the same leased out for ever" must necesarily terminate when the *cestuis que trust* were in a position to call for a conveyance, otherwise it would be void. (3) That the charge of the annuities on these lands did not necessarily imply a power to sell, and in this case it was clear it did not, as the testator expressly prohibited selling or mortgaging, which prohibition was a qualification of the powers of the trustees only, and did not apply to the equitable estate in fee of the grandchildren, as in that case it would be repugnaut and void.

Although there may be a trust for conversion the beneficiaries may, if absolutely entitled, elect to take the property in its actual estate.

Where the several members of classes of persons interested in an estate severed in instructing counsel, the Court, though it gave them costs out of the estate, directed the attention of the Master to the subject on taxation.

Statement.

The bill in this case was filed by the executors of *Francis Lundy*, the elder, for the construction of his will.

The testator made his will on the 12th of July, 1862, and directed payment of his debts, funeral and testamentary expenses by his executors as soon after his decease as possible. He then devised to his son *Joseph* ten acres of land then in his possession for, during, and unto the end of his natural life, and then to revert to the testator's estate. He also devised to his daughter *Sarah*, now *Sarah Holmes*, a village lot in Brampton, with the brick and frame houses on it; also,

1876. Crawford v. Lindy. the sum of £40 to be paid to her annually out of his estate; the said lot and houses to be her property in fee simple for ever. He gave to his wife *Nancy* the sum of £50 annually, to be paid out of his estate, for her natural life, and she was to have the right to select such of his furniture as she might choose, and to occupy the brick dwelling house (devised to his daughter) for her life. He devised to his grandson *Francis McIlvane*, a farm of 160 acres, in Goderich, to become his property in fee simple upon his attaining his majority, provided his father, *Thomas McIlvane*, should have at that time paid to the testator or his estate, as rental for the farm, the sum of £1,000, otherwise the said farm to be still under rent until £1,000 should have been paid to him or his estate, and he devised the farm to his executors to enable them to carry out the trusts in his will concerning it.

Statement. He next devised as follows: "I give, devise, and bequeath to my executors hereinafter named, their heirs and assigns for ever, the westerly half of lot No. 10, in the 4th concession east of Hurontario street, in the township of Chinguacousy; also the east and west halves of lot No. 10, in the 3rd concession east of Hurontario street in the township of Chinguacousy; also the house and lot owned by me in the village of Clinton, upon trust for the benefit of the several devisees, hereinbefore and hereinafter mentioned. First, to sell and absolutely dispose of my said village lot and house in Clinton and invest the proceeds for the benefit of my four grand-children hereinafter named; also to collect the balance due upon a certain mortgage made by one *Joseph Curley* and wife, and invest the same for the benefit of my said grand children. Second, to lease the said lots or farms, viz., the west half of lot No. 10 in the 4th concession, and the east and west halves of lot No. 10, in the 3rd concession of Chinguacousy, and to keep the same leased out for ever, and

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the said lands in no case to be sold or mortgaged; the rental of the said farms, after paying thereout the said annuities of £40 and £50 to my daughter and to my wife as hereinbefore provided, to be held in trust by my said executors for the benefit of my four grandchildren hereinafter named, and to be invested for the said grandchildren and allowed to accumulate for the period of twelve years from the day of my decease, and then to be paid over to the devisees entitled thereto and thereafter to become payable to said devisees annually. I give, devise, and bequeath unto my grandchildren, viz., *Francis Lundy*, *Francis Bowsfield*, *Francis Hunter*, and *Francis Dean*, the rentals issuing out of the said farms in Chinguacousy, the moneys arising out of the sale of my house and lot in Clinton, and the balance due or to grow due on the mortgage made by *Curley* and his wife to me, in equal parts, share and share alike."

Statement.

After some other devises and directions, not material to the present question, the will contained a residuary clause as follows: "I give, devise, and bequeath to my executors, hereinafter named, all the rest, residue, and remainder of my real and personal estate, to be by them turned into cash and invested for the benefit of my said grandchildren hereinbefore named, subject however, to the maintenance and support of my wife and daughter *Sarah*, for one year from the day of my decease, without reference to and over and above and beyond any provision hereinbefore made for them or either of them." And he appointed the plaintiffs his executors.

The testator died on the 18th July, 1862, and his widow on the 20th May, 1871.

On the 2nd September, 1874, the grandson *Francis Lundy* conveyed all his interest in the estate to *Joseph Lundy*, and he with the other three grandchildren

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claimed to be *cestuis que trust* of the fee simple of the farms in Chinguacousy, and demanded to have a conveyance thereof executed to them, "which the plaintiffs are advised they cannot safely comply with without the direction of this Court."

The four grandchildren, *Joseph Lundy* and the heirs-at-law of the testator, were defendants in the suit.

The cause came on for hearing on bill and answer.

Mr. *Beynon*, for the plaintiffs.

Mr. *Hoskin*, Q. C., Mr. *Moss*, Mr. *Foster*, Mr. *Fleming*, and Mr. *Watson*, for the defendants.

Phillips v. *Gutteridge* (*a*), *Bootle* v. *Bundell* (*b*), *Fair et al.* v. *McCrow* (*c*), *Dobbie* v. *McPherson* (*d*), *Shaw* v. *Thomas* (*e*), *Moore* v. *Cleghorn* (*f*), *White* v. *Simpson* (*g*), Doe *Keen* v. *Walbank* (*h*), *Jarman* on Wills, vol. i., page 756, were referred to.

The points suggested by counsel are stated in the judgment.

Judgment.

PROUDFOOT, V. C. [After stating the facts as above.] I apprehend that under this will the four grandchildren are entitled to the equitable fee simple in the Chinguacousy farms, subject to the charge of the £40 annuity in favour of *Sarah Holmes*; and the twelve years for the accumulation of the rents having elapsed, they are entitled to direct the trustees to convey—

(*a*) 4 De G. & J. 531.
(*b*) 1 Mer. at 232.
(*c*) 31 Q. B. 599.
(*d*) 19 Gr. 262.
(*e*) 19 Gr. 489.
(*f*) 10 Beav. 423, affi'd. on Ap., 12 Jur. 59.
(*g*) 5 East 162.
(*h*) 2 B. & Ad. 554.

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unless the duty of the trustees to pay the annuity out of the rents interposes an obstacle to the immediate conveyance. But as the annuitant unites with the grandchildren in desiring a conveyanee by the trustees all that need be done is for the trustees to convey subject to the charge of the annuity.

There is no appreciable distinction between a devise of the *rentals* and a devise of the *rents* and *profits*. It is an established rule that a devise of the rents and profits is a devise of the land, and if these be given in perpetuity, the estate is a fee simple: Doe *Goldin* v. *Lakeman* (*a*), *Blunn* v. *Bell* (*b*). Here the devise to the executors and their heirs carries to them the legal fee, which they take upon trust to lease for ever and out of the rentals to pay the two annuities and accumulate the remainder for twelve years, and then to be paid over to the devisees entitled thereto, and thereafter to the devisees annually. It was said that the devise of the lands upon trust *for the devisees hereinbefore and hereinafter mentioned* gave an estate in common to the wife, daughter, and grandchildren for life, there being no words of inheritance referring to the *cestuis que trust*. But the second clause shews clearly that the interest of the wife and daughter, the devisees *hereinbefore* mentioned, is only in regard to their annuities, and that they take no estate in common with the grandchildren, who are expressly made devisees of the rentals in equal parts, share and share alike. Nor do I think words of inheritance necessary to carry the equitable fee. The testator is to be considered as devising all his estate unless a contrary intention appear in the will (*c*).

Judgment.

It was then argued that a contrary intention did appear; that in some instances he has expressed the

(*a*) 2 B. & Ad. 42. (*b*) 2 D. M. G. at 781.
(*c*) Con. Stat. U. C. ch. 82, sec. 12.

1876. Crawford v. Lundy. estates to be for life, and in some in fee;—that the direction to sell the Clinton lot, and the charge of the annuities on the farms, implied a power of sale, and were therefore inconsistent with a fee in the *cestuis que trust,* and so with the power to lease.

I see no logical necessity for reducing the estate to a life estate because in other cases he has given some life estates and some estates in fee—the argument would be as good from these premises that he meant a fee to pass. And a charge of the annuities does not necessarily imply a power to sell; but it is clear that it does not do so in this case, for there is an express prohibition either to sell or mortgage: *Bennett* v. *Wyndham* (*a*).

Nor is the power to lease any more cogent evidence of a contrary intention. Where an estate in fee is vested in trustees for *cestuis que trust* in fee, the power Judgment. is a usual one, and this power though expressed to be for ever must necessarily terminate when the *cestuis que trust* are in a position to call for a conveyance, otherwise it would be void: *Lade* v. *Holford* (*b*).

The prohibition to sell or mortgage is a qualification of the powers of the trustees only. If it could be read as applying to the equitable estate in fee it would be repugnant and void: *Holmes* v. *Godson* (*c*).

The argument on behalf of the heirs would give to the grandsons but a life estate, and assume an intestacy as to the remainder. But in this the residuary clause is entirely overlooked; for if the prior devise gives only a life estate, the remainder passes by the residuary clause, and is to be sold for the benefit of the same grandchildren. And it is clear that although there

(*a*) 23 Beav. 521. (*b*) Amb. 479.
(*c*) 8 D. M. G. 152.

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be a trust for conversion the beneficiaries may, if absolutely entitled, elect to take the property in its actual estate (*a*).

There will, therefore, be a declaration that the grandchildren are entitled to an equitable fee simple in the Chinguacousy farms, subject to a charge of £40 per annum in favour of *Sarah Holmes* during her life, and are entitled to direct the trustees to convey in such manner as they may please to require.

The bill in this case is not framed as it ought to have been,—as it omits to state the residuary clause,—and professes to set out one or two other clauses in *haec verba* while it does not do so in fact.

Judgment.

While I cannot say the construction of the will is so obvious that there was no need of asking the opinion of the Court, I do not think there was a necessity for the appearance of so many counsel. One counsel appeared for the plaintiffs; three for the heirs-at-law; some for one, some for others, and two for the grandchildren and the assignee of one of them. I see no reason for the same classes of parties severing in instructing counsel, and direct the attention of the Master to the subject on taxation. With that direction the costs of all parties will come out of the estate.

(*a*) 1 Jarman 564.

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Re H. J. Weeks, an Insolvent.

Appeal from County Judge—Evidence of claim.

This Court will, on appeals from the Judge's ruling in insolvency—as on appeals from other Courts—in cases where the evidence is contradictory, be governed in a great measure by the opinion of the Judge who has seen the witnesses give their testimony; yet where giving full credence to all the witnesses relied on by the Judge this Court differed in opinion from him as to the effect of that evidence, this Court reversed the finding of the Judge.

In proceedings before the County Court Judge, a claim was put in by the mother of the insolvent, which the creditors opposed the allowance of, on the ground that the mother was indebted to the son in a greater amount than her claim—such claim being distinctly proved by the claimant, her husband and the insolvent. The Judge allowed the claim, from which allowance the inspectors of the estate appealed, and then sought to impeach the claim of the mother altogether as being fraudulent—the only objection suggested in opposition to the evidence stated, being the fact that the money said to have been deposited in the bank by the claimant was in gold (sovereigns), which the Court was asked to assume was so improbable and incredible as to be evidence of fraud. The Court, however—on the ground that the Judge who saw the parties give their evidence had thought the proof of the *bona fides* of the debt sufficiently established and had allowed the claim—agreed in the conclusion at which the Judge had arrived, and dismissed the appeal with costs.

Statement. This was an appeal from the late Judge of the County Court of the County of York (*Duggan*), allowing the claim of the mother of the insolvent to the amount of about $800, on the grounds stated in the head-note and judgment.

March 3rd. Mr. *Maclennan*, Q. C., for the appeal. The first ground relied on by the appellants is, that there is not evidence here sufficient to establish the claim set up by Mrs. *Weeks;* and second, the claimant was married some twenty-five years ago in England, and any property she had then became her husband's; so that, if her own version of the transaction be correct, she has in fact

abstracted a sum of money from the moneys of her husband and lent it to the insolvent. The evidence of the insolvent shews that he has expended moneys in the erection of the buildings on the property. The wife claims this property: the husband says it is not his. On the true state of accounts between the insolvent and the claimant the claimant is indebted to the insolvent. In fact no claim would ever have been made but for the insolvency of the son, and the attempt now made by his family to lay hold of all his effects. The whole statement as to the advance of the moneys is improbable. 1876. Re H. J. Weeks.

Mr. *Read*, Q.C., contra. The nature of the contestation filed by the creditors against this claim is quite different from what is now set up on this appeal against the allowance of the claim; then it was simply that the balance was against the claimant; now, it is sought in the event of that ground failing to impeach the transaction on the ground of fraud. Argument.

Mr. *Maclennan*, Q.C., in reply. The question is not one of the credibility of evidence only; but take the evidence of the parties on whose statements alone the claim is based and, it is not sufficient to warrant the allowance of this claim.

PROUDFOOT, V. C.—This is a claim by *Eliza Weeks* against the estate of her son, the insolvent, for money lent, in 1872, $310, and in 1874, $90 and $261; also money lent for which a note was given to *G. M. Hawke*, but was in reality the claimant's—and this note she afterwards destroyed—and $210 for rent. April 5th. Judgment.

The Judge of the County Court has allowed the claim, and, I think, I cannot disturb his decision.

The evidence is clear and distinct, of claimant, her husband and the insolvent, that the money was lent to

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the insolvent by the claimant. There is nothing the other way except the fact of the money deposited in the bank by the claimant being most of it in gold, English sovereigns, and I am asked to assume that this is so incredible and so improbable that it ought not to be believed. I cannot do so. But the only ground of opposition to the claim on the papers in insolvency is that the claimant is indebted to the insolvent in a larger amount, and I do not think the contestants are at liberty to travel out of the record and insist upon other grounds of resistance to the claim The contestants do not, therefore, deny the amount of the claim proved, but admitting that, insist that the claimant is indebted to the estate in a larger amount, and the answer to the objection insists that the claimant is not so indebted to the estate. As I understand it, where an objection to any claim is made under the 70th section of the Act of 1869, the ground of objection must be specified, and to permit a wider range of opposition than that specified would be to render the proceedings so uncertain that no litigant would know what he was to answer. If the objection was defectively framed an application might have been made to amend it, but this has not been done. I decline, therefore, to consider several of the matters argued before me, and direct my attention only to those covered by the pleading.

Judgment.

The Judge discredits the insolvent when he gives evidence adverse to the claim, and I have no means of determining that he was wrong in so doing. The evidence then is only that of the claimant and her husband —the question whether the claimant was indebted to the insolvent. The contestants say that there were accounts between the claimant and insolvent which are not settled; that the insolvent made advances for the land bought and buildings erected, and has in that way overpaid any debt the claimant could have against him. I think the fair result of the evidence is that in the land matters

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the son acted as agent of the claimant. I adopt the conclusion of the Judge that the money was the claimant's, and that the insolvent employed it for her benefit in the purchase of the land and erection of the building, and obtaining the money on the mortgage, and that there was no agreement to the contrary. And, upon the only evidence I can look at, I do not think the insolvent has any interest in the land, or that he made any advances of his own money in regard to it. And upon the same evidence the deed of the whole should have been taken in the claimant's name.

The transaction was not managed in a very business-like manner; the mother trusting to her son did not have everything between them put in writing, and it seems, she was desirous of concealing the extent to which she was accommodating her son from her husband. But these circumstances are not sufficient to discredit her testimony, and, besides, the husband does not claim any interest in the money. He admits it was the claimant's; that she had money of her own, which he borrowed from her and repaid. He disclaims any interest in the land, and that the deed of a portion to him was taken without his knowledge or consent. His promise to repay the wife, or as it was termed to ratify her appropriation of his money, is not a thing of receut date. He had borrowed and lost her money in England, and had promised her there to repay it. He had permitted her to deal with the cash in his business in Yonge street; he knew she was putting some of it away, and gave, at least, an implied sanction to it.

Judgment.

I agree in the conclusion at which the Judge arrived and dismiss this appeal with costs.

In the same matter the Judge of the County Court had allowed the claim of the father for $1,800 against

1876. the estate. From this the inspectors also appealed, insisting that the father and son had in reality been partners in carrying on business.

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The evidence is stated sufficiently in the judgment.

Mr. *Maclennan*, Q. C., for the appeal. The short question on this appeal is simply was or was not the claimant a partner of the insolvent. If a partner clearly his claim should not have been entertained by the Judge, and this appeal should now be allowed. The documentary evidence agrees with the depositions of the parties, and all are inconsistent with the notion that a partnership had not existed : *Hickman* v. *Cox* (*a*), the case relied on by the learned Judge in the Court below is no authority here. The evidence shews that the claimant was in business, the stock and good-will of which he sold out, and the money produced by that sale he invested in the perfumery business. Then no receipt is demanded or given for the money ; neither is any security for its repayment, and now neither of the parties will pledge his oath that the transaction was a loan. On the contrary it is shewn that the claimant and the insolvent after that arrangement go to live together, and the expenses of their household are all paid out of the business. Taking the statements of the parties themselves the Court has a right to assume that the business carried on was a partnership one.

Argument.

Mr. *Read*, Q. C., contra. Every partnership supposes a community of profits, but there may be a community of profits without there being a partnership as between the parties. A point of some importance in deciding this question is the manner in which the insolvent kept his bank account, which was in his individual name ; this the father would never have consented to had he in reality been a partner. The Judge below

(*a*) 8 H. L. 268.

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who took the evidence and had an opportunity of judging by the demeanour of the witnesses, the credit due to each has stated in his judgment, what witnesses he believed and did not believe, and the conclusion upon a consideration thereof at which he arrived; and this Court acting as an appellate jurisdiction will be slow to interfere with that finding unless upon the clearest of evidence: *Cox* v. *Hickman (a)*, *Smith's* Mercantile Law, 20-22, and cases there cited.

April 5th. Judgment.

PROUDFOOT, V.C.—The Judge of the County Court has allowed this claim of $1,800, and from this the Inspectors of the estate have appealed on two grounds: 1. That the claim should be postponed to the claims of all the other creditors, as the notes of which the said claim consists were given by the insolvent to the claimant for the amount of his share in the business as partner of the insolvent, on the claimant withdrawing from partnership; and 2. that the claimant is indebted to the insolvent estate in an amount equal to the claim.

The Judge rejected the evidence of the insolvent, and of a witness, *Cuttle,* as he did not believe them. Upon this subject I have no means of determining the credibility of the witnesses, and must acquiesce in the conclusion of the Judge, who saw them and took their evidence.

The appellants, however, say that upon the evidence of the claimant himself and papers in evidence, it is clear that the claimant and insolvent were partners.

It seems according to the claimant's statement that there was a negotiation or treaty for a partnership between him and the insolvent about January, 1873, and articles of partnership are produced which were prepared by the insolvent dated the 7th January, 1873.

(*a*) 9 C. B. N. S. 47.

1876. Re H. J. Weeks. These were not signed. The claimant says that the arrangement never was finally completed. They had a dispute about money matters when the claimant refused to join him as a partner. Notwithstanding this, however, the claimant continued to advance large sums of money to the insolvent by way of loan. These were advanced without any security, not even a bond, note, or mortgage, and with no time fixed for repayment, and no agreement for payment of interest. The advances so made amounted to about $3,990, and giving the insolvent credit for the largest sum the claimant thought he would have against him, there would be due to the claimant $2,990. It was not till January, 1875, that the claimant told the insolvent he ought to pay interest, and he agreed to give interest. On the 1st May, 1875, the claimant and insolvent had a settlement, when the claimant took the notes in question for $1,800, payable in one, two, three, and four years respectively, with interest at 8 per cent. On the occasion of this settlement the claimant gave a receipt for the notes which is expressed to be "In full of all demands I have against *H. J. Weeks*, (the insolvent) of my interest in the drug and perfume business carried on in the rear of Nos. 106 to 112 Lumley street, Toronto, known by the style of *H. J. Weeks & Co.*, and carried on by and in the same name of *H. J. Weeks & Co.*" The claimant says he did not read this. There is a slight circumstance regarding the signature which seems to imply a little more deliberation. It is signed "*James Weeks*, of the city of Toronto. Dated 1st May, 1875." There is an elaborateness in this signature that does not very well correspond with the careless way in which it is said to have been made.

Judgment.

The insolvency took place in August, 1875. An action was brought in the County Court by one *Morse*, against the insolvent and claimant, on a note made by *H. J. Weeks & Co.*, on the 23rd of July, 1875, for

$177.99, at thirty days. On the 21st of October, the claimant was examined before the Clerk of the County Court. He says he was not at the date of the note a partner with the insolvent, which is quite consistent with his having been a partner on the 1st of May previous. He further says " I was in partnership with *H. J. Weeks* in a kind of a way. It commenced in June, 1873, and continued until last May. I say *a kind of a way* because I was to be a partner, but no agreement was signed. It was the perfume business we were to be partners in. That business was carried on. I never worked at it. I put money in it. I put money in it; about $2,400 in different sums. I suppose the first sum put in by me was in May, 1873. The remainder was put in within June and July following * * * I never have looked at the books of the business and have never received any profit from it. I never inquired as to what became of the $2,400. I believe it went in to increase the stock and the business. The business was to be under the name of *H. J. Weeks & Co.* I did not know the particulars of the negotiable paper used in the business. I remember *H. J. Weeks* saying to me occasionally that negotiable paper had to be given to persons, and I said *very well.* The way said partnership ended was, I was to get so much to go out. This arrangement was made before the 1st May aforesaid, but was settled then on *H. J. Weeks* saying he expected to get a person to be a partner. As a matter of fact such partnership, if it was a partnership, was to come to an end on the 1st of January last, but I allowed it to run on, as he wished to get a partner. The terms of determining said partnership were, I offered to take so much to go out relinquishing all right and title to the business. He agreed to it."

Being examined on his own behalf, he said, "No articles of partnership were ever signed between my step-son *H. J. Weeks* and myself. Articles of partner-

1876. ship were written out between us in 1873, but never signed, as things were never carried out as they were intended to be. I have never received a cent of profit from said business. There was no partnership between us as to profit and loss. It was intended to be, but was never carried out. All I ever got out of the $2,400 was some coal and wood, which I thought I ought to have as interest on my money. There was no verbal or other bargain between us, whereby I was to get a share of profits from the business."

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The examination in insolvency was on the 25th of January, 1876, and the variance between it and the examination in October previous is very remarkable.

In the October evidence not one word is said about the advances being loans. On the contrary, he says, he was a partner in a kind of a way, and by this he means he was to be a partner, but no agreement was signed; that he put the money into the business, and then he was to get so much to go out of the busiuess, and to relinquish all right and title to the business. This was his own offer. He was not getting repaid money advanced as a loan, but so much for his interest in the business. The reason for the articles not being signed was, "because things were never carried out as they were intended to be." Nothing is said as to a dispute about money matters, although it is possible that may be comprehended in the things not carried out. A very material point, however, is in regard to the negotiable paper used in the business. The insolvent informed him of the need to give such paper, and he answered "Very well." This to my mind is very cogent proof of the claimant being a partner. His consent is asked as to the financial management, and he gives it. On referring to the articles of partnership prepared for execution I find a covenant that the partners, or either of them, shall not either in the name of the partnership or in-

Judgment

dividually in their own names draw or accept any bill, or bills, promissory note, or notes, or become bail or security for any person or persons, or do anything whereby the partnership's effects might be taken in execution. This extraordinary covenant would seem to confine the business to cash dealings, and probably was the reason for the claimant's consent being asked as to giving negotiable paper. 1876. Re H. J. Weeks

It is to be remarked also that the proposed term in the articles was twenty years, and this might well cause the claimant to hesitate as to binding himself for so long a period, while the non-execution of such an instrument would have very little effect as disproving a partnership for a shorter time. But the claimant himself furnishes the time for which the actual partnership was to exist. It was to come to an end on the 1st of January, 1875, but he allowed it to continne till May.

All this examination harmonizes with the evidence furnished by the receipt of the 1st of May ; and when balancing the comparative value to be given to these discordant statements of the same person, it is to be recollected that when examined in the County Court action the claimant had very little inducement to disguise the nature of his interest in the business. For the note sued on was given nearly three months after he had sold out, while at the examination in insolvency it was of vital importance to him to deny the partnership. I am satisfied that the receipt does express the true relation that had existed between the parties ; and it is probable that the terms of the articles were to regulate the firm formed for the shorter term; though this is not of much importance, and in the absence of any specific stipulation as to profits and loss, the parties would share equally. Judgment.

The evidence of the witness *West* and of Mrs. *Weeks*

1876. is of small importance ; they never knew of a partnership.

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I have only considered the evidence on which the Judge of the County Court placed reliance, and upon that evidence I come to the conclusion that the claimant and the insolvent were partners from early in 1873 (7th January) till 6th May, 1875, and therefore that the claimant's proof should be expunged ; that the order of the Judge of 12th February, 1876, be reversed.

Judgment.

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Purchase of debentures by a bank—Ultra vires—Injunction—Parties.

The Imperial Bank of Canada, by virtue of its Act of Incorporation (36 Vic. ch. 74), and the provisions of the General Banking Act, (34 Vic. ch. 5, D.) has a right to purchase debentures of municipalities.

Where a bill was filed to restrain one of the chartered banks of the province from purchasing from the Water Commissioners of the city of Toronto $900,000 of debentures issued by the city :

Held, that the Water Commissioners were necessary parties to the suit.

The plaintiff, in order to qualify himself to sue as a shareholder of a bank, purchased one share of the stock thereof, which he swore he paid for with his own money and bought of his own motion, for the purpose of testing the legality of a transaction into which the bank was about to enter.

Held, that this gave him a *locus standi* in Court, although the circumstances were suspicious, the rule being that where in such a case the plaintiff is shown to have a substantial interest the Court will not refuse relief, although there may be room to suppose he may have other objects in view which could not be approved of.

In this case one *Alfred Jones* sued on behalf of himself and the other shareholders of the Imperial Bank, to restrain the bank from completing a purchase of city of Toronto debentures to the amount of $900,000 under the circumstances fully set forth in the judgment ; and a

notice of motion for an injunction was given, whereupon the defendants filed a demurrer for want of parties. 1876.

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Mr. *T. Ferguson* in support of the demurrer referred to *Hare* v. *The London and Northwestern R. W. Co.* (*a*), *Parker* v. *The River Dunn Navigation Co.* (*b*), *Maunsell* v. *The Midland and Great Western of Ireland R. W. Co.* (*c*), contending that here there was a contract in existence for the purchase of the city debentures from the Water Commissioners, and they clearly were entitled to be heard before having their dealings interfered with, and in that view should have been made parties to the bill. The bill seeks to restrain the bank from using the funds of the institution in the purchase of municipal debentures, on the ground that this is a dealing not within the proper functions of a bank; that is, that the Act is *ultra vires*. If it be so, then it is wholly void, and nothing can validate the contract, even if they put their corporate seal to it. March 4th.

Argument.

Mr. *Moss*, contra. The matter complained of is, that the funds of this bank are about to be employed in an illegal way; in a manner that is not authorized by the Acts of the Legislature. The bank has made a tender for the purchase of these debentures from the Water Commissioners, which tender either has been or will be accepted; the seals of the corporation have not been affixed to the contract, and this being so there is still a *locus pœnitentiæ* for both parties.

The cases referred to are not analogous to the present; they are all railway cases, which admit of different rules of construction. The case most resembling the present in all its circumstances is that of *Marker* v. *Marker (d)*.

Here no damage can possibly result to the Water

(*a*) 1 J. & H. 252.
(*b*) 1 D. & S. 192.
(*c*) 1 H. & M. 130.
(*d*) 9 Hare 1.

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Commissioners as they can at any time make a sale of the debentures to other parties: *Hartlepool Gas Co.* v. *Hartlepool Harbour Co.* (*a*), and there is nothing in these proceedings that can possibly prevent the Water Commissioners taking proceedings at law.

Mr. *T. Ferguson* in reply. The allegations in the bill are, that there has been an offer of one corporate body to another corporate body and an acceptance by the latter of such offer: thus in effect stating that there is a contract between the two: *Chambers* v. *The Manchester and Milford R. W. Co.* (*b*). *Marker* v. *Marker* cited by the other side, is quite distinguishable from this case, as here the Water Commissioners must necessarily be injured by granting an injunction, as the contract has been entered into, and since then they of course have ceased to look elsewhere for a purchaser.

March 11th. Argument.

On a subsequent day the plaintiff moved for an injunction in the terms of the prayer of his bill.

Mr. *Bethune* and Mr. *Moss* in support of the motion. The transaction between the bank and the Commissioners amounts to a sale and purchase, as the latter have entered into an executory contract to sell and the bank to buy. This, having regard to the powers of the Commissioners under the Act, amounts to a sale. It is *ultra vires* of the bank to buy debentures of this kind. It is a transaction not warranted by their charter. There is a great distinction between a purchase and a discount. The proper business of a bank is to deal in bills of exchange and promissory notes, and in gold and silver bullion. A bank can only properly discount a promissory note, which, as shewn by *Philadelphia Loan Co.* v. *Towner* (*c*) means the taking of interest in advance. The power of the Commissioners is to sell,

(*a*) 12 L. T. 366. (*b*) 5 B. & S. 558. (*c*) 13 Conn. 259.

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not to borrow on the security of the debentures, and if the Statute restricts the powers of the banks to certain acts, no custom that has been allowed to grow up in those institutions can confer on them wider powers than the Legislature has said they shall enjoy. It is plain in this case that this has not been treated as an ordinary discount transaction, and the evidence of the cashier shews that the only other transaction of this sort that the bank ever had was treated as a sale, not as a discount. It is not necessary for the plaintiff to shew positively that he is entitled to an injunction; it is sufficient for him to shew that there is really a question to be decided, and that it is one of importance. It certainly will not be pretended that this is not one of importance, involving as it does the expenditure of a sum of money greater than the paid up capital of the bank, and nearly as large as its whole subscribed capital: and the affidavits we submit shew there is really a question to be tried and which can only be properly disposed of at the hearing. They referred, amongst other cases not mentioned in the judgment, to *Talmage* v. *Pell* (*a*), *Dunkle* v. *Rennick* (*b*), *McLean* v. *Lafayette County Bank* (*c*), *Re The London and Hamburg Bank* (*d*), *The Joint Stock Co.* v. *Brown* (*e*), *Bloxom* v. *The Metropolitan R. W. Co.* (*f*). *Brice* on *Ultra Vires*, page 80.

Argument.

Mr. *Hillyard Cameron*, Q. C., and Mr. *T. Ferguson*, contra, referred to the charter of the Bank of England (sec. 27) shewing the powers given to that institution; also to the charter of the Bank of Ireland, established in 1783, and that of the Bank of Scotland, also, to that of the Bank of North America in the United States, from which the restrictions contained

(*a*) 3 Sel. N. Y. Rep. 342.
(*b*) 6 Ohio St. Rep. 527.
(*c*) 3 McLean 185.
(*d*) L. R. 5 Ch. 444.
(*e*) L. R. 8 Eq. 376.
(*f*) L. R. 3 Ch. 337.

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in the British charters are entirely omitted. In none of these charters is there a single word said about promissory notes and negotiable securities, no doubt because these matters were looked upon as part of the ordinary business of banks; while in every one of the charters in the United States down to the year 1825 there was a clause prohibiting the banks from dealing in stocks.

The American cases referred to by the other side apply to a different state of things from that which is in existence here, where there are no usury laws.

As to the use of the funds of the bank, see *Morse* on Banking page 5; and *Grant* on Banking page 365, shews that when a bank discounts a note or bill it becomes the owner of it, or as it is stated, "the discount of the bankers makes them purchasers of the bills"—*Carstairs et al.* v. *Bate (a).* It appears clearly, therefore, that the discounting of a bill of exchange is a purchase of it. Then again there is the express authority given by the statute here for banks to acquire and hold Dominion stocks and others debentures.

Argument.

There is nothing in the charter of this bank which prevents it from dealing with these debentures in the manner that it has. Exchequer bills (if they existed in this country) are not bills of exchange, and yet they are dealt in by all banks.

The Court will also look at the want of *bona fides* on the part of this plaintiff, who does not venture to state that the funds of the bank are to be endangered in any way, or that he individually will be injured in any way; but he asserts broadly that being aware of the purchase by the defendants he purchased this one share of the stock for the sole purpose of testing the legality of the

(*a*) 3 Camp. 301.

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transaction, in fact the plaintiff places his right to the interference of this Court on the broad proposition of law that the banks in the Dominion have not the right to become the purchasers and holders of municipal debentures. They referred to *McLae* v. *Sutherland* (*a*), *Brandao* v. *Barnett* (*b*), *Bank of Australia* v. *Breillatt* (*c*), *Re General Estates Co.* (*d*), Law Times of 20th March, 1875, page 353—article on Negotiable Instruments; *Gilbert* on Banking 68 and 78.

March 15th.

PROUDFOOT, V. C.—This bill was filed by *Alfred Jones* on behalf of himself and the other shareholders of *The Imperial Bank* against *The Bank*.

Judgment.

It states that the defendants are an incorporated company, and the plaintiff is a shareholder of one share of $100, fully paid up in the capital stock. That the Water Works Commisioners of the city of Toronto are the holders of certain bonds or debentures issued by the municipal corporation of the city of Toronto to the amount of $900,000, and have offered the same for sale by public tender. That the defendants have tendered for the purchase of the debentures to the Commissioners, and have offered the sum of 99 cents cash on the dollar for the face value of the bonds, and the Commissioners have accepted the offer, and the sale and purchase are about to be carried out; and the defendants threaten and intend, and will, unless restrained, &c., purchase the said bonds or debentures, and pay the cash price. That the defendants have not the right, power, or authority to deal in or purchase bonds or debentures of any municipality, and the said purchase would be contrary to their act of incorporation; and prays for an injunction accordingly.

A notice of motion for an injunction was given, which

(*a*) 3 E. & B. 1.
(*b*) 12 C. & F. 787.
(*c*) 6 Moo. P. C. 152.
(*d*) L. R. 3 Ch. 758.

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was intercepted by a demurrer, because the Water Works Commissioners are not made parties to the bill. The demurrer was argued, and at the request of the defendants the motion was adjourned till to-day (11th March) and I decided not to give judgment on the demurrer till the motion was heard. The motion was made and argued to-day; and it was further objected by the defendants *ore tenus* that the city of Toronto were necessary parties.

From the examination of the plaintiff it appears that he heard of the tender of *The Imperial Bank* before purchasing his one share of stock, and that he is a clerk of *A. T. McCord*, Jr., who had also tendered for the debentures; but he says he paid for the share with his own money, and bought it of his own motion, for the purpose of testing the legality of the transaction, and that he is not the agent of Mr. *McCord* in the purchase.

Judgment.

The Toronto Water Works Commissioners are a corporation created by the Ontario Act, 35 Vic., ch. 79, and for the purpose of constructing the water works of the city of Toronto, (section 29) were authorized to issue debentures of the city of Toronto to be called Water Works Debentures, to the amount of $500,000, (increased by 37 Vic., ch. 75, sec. 4, O., to $1,100,000); and by section 30, the Commissioners were authorized to sell and negotiate them as to them may seem most expedient and advantageous to the interests of the city of Toronto.

These debentures are signed by the Mayor and Treasurer of the city, and sealed with the common seal, promising to pay to *the bearer* the amount specified in them on the 1st of October, 1897, and have coupons attached for interest at 6 per cent. payable half yearly.

The principal question argued was as to the power of

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The Bank to purchase the debentures. *The Bank* was incorporated by the Dominion Act, 36 Vic., ch. 74, and the provisions of the General Banking Act, 34 Vic., ch. 5, D., were applied to it, and it is upon the construction of this latter Act the contest arises. The 40th section enacts that the Bank shall not "either directly or indirectly, deal in the buying and selling, or bartering of goods, wares, or merchandise, or engage or be engaged in any trade whatever, except as a dealer in gold and silver bullion, bills of exchange, discounting of promissory notes or negotiable securities, and in such trade generally as appertains to the business of banking." The 51st section provides that nothing in that Act shall prevent the Bank from holding as collateral security for advances or debts, the shares or the bonds or debentures of municipal or other corporations, or Dominion, Provincial, British or Foreign public securities; and to sell them in case of default—a power which may be modified by the agreement of the Bank and the owner : (*a*).

Judgment.

It was admitted that these debentures were negotiable securities, but it was argued that there was a difference between a purchase and a discount of a security ; that a discount always implied a loan, and that here there was no loan to the Water Works Company ; no liability on their part to pay the debt, and no right to redeem the securities. I do not think the term is of such a limited signification. *Grant*, on Banking 350, 351, says that where a banker discounts a bill for a customer, giving him credit for the amount of the bill, and debiting him with the discount, there is a complete purchase of the bill by the banker, in whom the whole property and interest in it vest, as much as in any chattel he possesses. A banker discounting a bill, whether for a customer or a stranger, there being no indorsement by the customer or stranger, and the bill not being

(*a*) 36 Vic., ch. 8, sec. 6.

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given in payment of an antecedent debt, is a mere purchaser, and on the bankruptcy of the acceptor has no recourse on the party from whom he took it. In truth the term has a variety of meanings which may be found *sub voce* in the English Cyclopædia, Arts and Sciences Div. article, by professor *De Morgan*. One of these is peculiarly applicable to this question. "The word discount is further used in contradistinction to premium, to denote the diminution in value of securities which are sold according to a fixed nominal value, or according to the price they may have originally cost. If, for example, a share in a canal company, upon which £100 has been paid, is sold in the market for £98, the value of the share is stated to be at 2 per cent. discount."

To discount a negotiable security is therefore to buy it at a discount; or it may mean, using another sense of the word, to lend money on the security, deducting the interest in advance; but I see nothing in the Act to confine the construction to either of these senses—it is wide enough to include both.

Judgment.

I do not think the 51st section limits the construction of the 40th section. The object of the 51st section was to prevent a loan or a discount on the security of its own stock, but gave a privileged lien on the stock with power to prevent transfers, and a power to sell in default of payment. The second clause of the section does not affirmatively give power to hold the securities mentioned as collateral, but says nothing in the Act shall prevent them holding them as collateral, and gives a power of sale. The 41st section had given express power to the Bank to take and hold, and dispose of mortgages, and hypotheques upon personal as well as real property by way of additional security for debts, and the 56th section, paragraph 2, was probably inserted to negative the notion of their power to take collaterals only on real estate or personal property.

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The argument from the fact of the schedule of returns, section 13, containing a column for debts secured by securities, and none for securities owned, seems to me of small importance, as there is a column for other assets not included in the other heads, which would, of course, comprise the securities become the absolute property of the Bank by purchase.

But the Act also authorizes *dealings in such trade generally as appertains to the business of banking.* It was insisted that this was confined to the powers specified in the Act, and so strictly was it construed that it was contended a bank could not purchase a promissory note, although it might a bill of exchange, as *discounting* was applied to the former and not to the latter; but I do not think the phrase is to be so limited. There are many powers which may be exercised by a banking corporation which are not specially mentioned, such as borrowing money for the use of the Bank: *Bank of Australia* v. *Breillat* (*a*), where the Bank had no power to borrow money by its deed of settlement, but it was held to be necessarily implied as incidental to to the business of the Bank. And so in the case cited by Mr. *Bethune* of *Fleckner* v. *The United States Bank* (*b*), the Bank by the Act of Congress, 1816, ch. 44, sec. 11, art. 9, was prohibited from dealing in anything except bills of exchange, gold and silver bullion, or in the sale of goods really and truly pledged for money lent and not redeemed in due time, or goods which shall be the produce of its lands. It was not at liberty to purchase any public debt whatsoever, nor to take more than six per cent.; yet it was held that if discounting be a purchase of a promissory note in point of law, it could not have been the legislative intention to include such an Act; and again *Story*, J., says, "If, therefore, the discounting of a promissory note, according to the

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(*a*) 6 Moo., P. C. 152. (*b*) 8 Wheat. 338, 349.

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usage of banks, be a purchase within the meaning of the 9th rule (upon which serious doubts may well be entertained) it is a purchase by way of discount, and permitted by necessary inference from the last clause in that rule :" And in *Philadelphia Loan Co.* v. *Towner* (*a*), a clause in the company's charter prohibited it from discounting notes, or exercising any banking privileges whatever. The note there in question had been renewed several times, and the discount or interest in advance was paid or secured. *Williams*, C. J., says, " And although the discounting of notes in its most comprehensive sense may mean lending money and taking notes in payment, as is said in 2 *Cowan* 699, yet it is believed that in its more ordinary sense the discounting of notes or bills means advancing a consideration for a bill or note, deducting or discounting the interest which will accrue for the time the note has to run. When, therefore, a power to loan is given, but the power to discount notes is denied, it is apparent that the term discount must have been used in its more limited sense, more especially as the company are prohibited from the exercise of banking privileges."

Judgment.

In these instances while not affirming that discount and purchase are essentially different, and that discount cannot include purchase, it was held that the transactions were discounts in the limited sense.

But I do not consider it necessary to pursue this further by reference to American decisions, or to the implied powers exercised by the banks of England, Ireland, Scotland, and France, under charters which are very meagre in the definition of banking privileges. A reference to the legislation of our country will suffice to determine what the business of banking is, enough for the present purpose. The first active banking corporation in this Province was the Bank of Upper

(*a*) 13 Conn. 249, 259.

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Canada, created by 59 Geo. III., ch. 24, (in 1819); and by the 15th section, the Bank was not to deal in goods, wares or merchandise, but this was not to hinder it from *dealing in bonds, bills of exchange, or promissory notes, or in buying or selling bullion, gold, or silver.* The charter of *The Commercial Bank,* (1832), (*a*) and that of *The Gore Bank,* (1835), (*b*), contained the same powers. I apprehend that powers thus conferred appertain to the business of banking; and dealing in bonds, bills, and notes, without doubt includes purchasing as well as lending upon them—and if a bank might deal in a mere chose in action, such as a bond which would not pass by mere delivery—*a fortiori* would the power to purchase a debenture be included, which passes by delivery like a bank note, and requires no indorsement even to render it negotiable.

Judgment.

In 1841 *The Quebec Bank* (*c*), was incorporated with powers conferred in somewhat different phraseology; it was not to be engaged in trade except as a dealer in gold and silver bullion, bills of exchange, discounting of promissory notes, and negotiable securities, and in such trade generally as legitimately appertains to the business of banking. It will be noticed that *dealing* is applied to bullion and bills, while *discounting* is referred to promissory notes and negotiable securities. I do not think that any difference in the nature of the dealing with these things was intended; if there were, then the legitimate business of banking must have made the power as large as in the former instances.

In the same session *The Bank of the Niagara District* (*d*), was incorporated, and empowered to "deal in bonds, public securities, bills of exchange, or promissory notes, or in buying or selling gold or silver bullion," recurring apparently to the more ample phraseology of the earlier charters.

(*a*) 2 Wm. IV. ch. 2, sec. 14. (*b*) 5 Wm. IV. ch. 46, sec. 14.
(*c*) 4 & 5 Vic. ch. 74, sec. 10. (*d*) 4 & 5 Vic. ch. 96, sec. 15.

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In the same session *The City Bank* (*a*), received powers in terms similar to *The Quebec Bank*, and *The Bank of Montreal* (*b*) charter was renewed, with similar powers.

The charter of *The Bank of Upper Canada* (*c*) was extended with similar powers to the last; and so with *The Commercial Bank* (*d*).

In 1850, The Freedom of Banking Act, (*e*), for the purpose of that Act defined banking business as the making and issuing of bank notes, the dealing in gold and silver bullion and exchange, discounting of promissory notes, bills and negotiable securities, or such other trade as belongs legitimately to the business of banking.

Judgment.

In 1855 a number of banks were incorporated—*The Bank of Toronto*, (*f*), *The Eastern Townships Bank* (*g*), *Molson's Bank* (*h*), *The Niagara District Bank* (*i*), *The Zimmerman Bank* (*j*), with power to deal in gold and silver bullion, bills of exchange, discounting of promissory notes and negotiable securities, and in all such trade generally as legitimately applies to the business of banking.

I have referred to many subsequent Acts incorporating banks, which, with some slight variations, preserve the general character of those last quoted.

The conclusion which seems to me deducible from these Acts is, that the business of banking consists in dealing in money, the precious metals, and in bonds and

(*a*) 4 & 5 Vic., ch. 97, sec. 19. (*b*) 4 & 5 Vic., ch. 89, sec. 21.
(*c*) 6 Vic., ch. 27, sec. 19. (*d*) 6 Vic., ch. 26, sec. 20.
(*e*) 13 & 14 Vic., ch. 21, sec. 7.
(*f*) 18 Vic., ch. 205, sec. 16. (*g*) 18 Vic., ch. 206, sec. 20.
(*h*) 18 Vic., ch. 202, sec. 20. (*i*) 18 Vic., ch. 204, sec. 26.
(*j*) 18 Vic., ch. 203, sec. 20.

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negotiable securities ; that this dealing confers the power of lending on them or of purchasing them, whichever the bank directors may deem most for the advantage of the corporation ; and that whether to buy or lend is a matter of internal management which the directors may determine—and is not to be controlled by this Court, in the absence, at least, of circumstances which are not alleged or suggested here.

It is scarcely necessary to consider the position of the plaintiff, who was said not to be entitled to an injunction, as he had bought his share for another person, and only for the purpose of instituting this law suit. The circumstances are suspicious, and he seems to have been in communication with Mr. *McCord* throughout, while determining to test the question ; but I cannot disregard what he has sworn to, that he bought for his own benefit, with his own money, and is alone responsible for costs. In such circumstances the cases of *Seaton* v. *Grant* (*a*), and *Bloxam* v. *Metropolitan R. W. Co.* (*b*), shew that where a plaintiff has a substantial interest in the company, the Court will not refuse relief, though he might have other objects which could not be approved of.

Judgment.

I think, therefore, that the injunction must be refused with costs.

The question raised by the demurrer remains to be disposed of, but is only now material in order to determine who must pay the costs of it.

As corporations can only contract within the limits of the Act of Incorporation, a contract beyond these limits is void, while if a private persen assumes to contract for something beyond his interest, it may still be binding upon him ; and in this manner, I think, Mr.

(*a*) L. R. 2 Chy. 459. (*b*) L. R. 3 Chy. 337.

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Ferguson correctly distinguished the case of *Marker* v. *Marker* (*a*), from the cases cited by him of *Barker* v. *River Dunn Navigation Co.* (*b*), *Hare* v. *London & North Western R. W. Co.* (*c*), and *Maunsell* v. *Midland & Great Western* (Ireland) *R. W. Co.* (*d*), which establish that where a contract *ultra vires* is entered into by a corporation, both parties to it must be before the Court, on the ground shortly stated by *Wood*, V. C., in 1 J. & H. 253, "If I allowed the suit to proceed, in the absence of the other companies, any decree which I might make would not bind them, and the defendants might become liable in damages for obeying the orders of the Court."

The only question then is, whether the bill alleges a binding contract to have been entered into It states an offer to have been made by the one corporation and accepted by the other. The rule that all the regulations imposed by statute or common law should be particularly averred (*e*), is subject to the exception that where the facts involved in a conclusion of law are reasonably certain, so that it can only be made out by one set of facts, it will be sufficient that such conclusion be set out without the facts, for it will be intelligible without more (*f*). If a seal be necessary to bind the parties to the contract it must be assumed in compliance with this exception to have been so executed. The demurrer admits that the offer was made and accepted, *i.e.*, it must be an offer and acceptance binding on the parties to the contract; or as the rule is stated by Lord *Coke*, "All necessary circumstances implied by law need not be expressed —as in a plea of feoffment of a manor, livery and attornment are implied (*g*), and when it is pleaded that land was assigned for dower, it is not necessary to say it was by metes and bounds, for it will be intended a lawful

Judgment.

(*a*) 9 Hare 1. (*b*) 1 De G. & S. 192.
(*c*) 1 J. & H. 252. (*d*) 1 H. & M. 130.
(*e*) *Lewis* 57. (*f*) *Lewis* 63. (*g*) 8 Co. Rep. 81 *b*.

assignment, which is by metes and bounds." (*a*.) The subject of the certainty or particularity now required in pleadings, was much discussed in *Grant* v. *Eddy* (*b*), and the first rule applicable is stated on page 576, that "It is the duty of the Court to put a fair and reasonable construction on the pleading, to ascertain what is reasonably to be inferred from the language used, and if, as a whole, it presents a case entitling the plaintiff to relief, to allow it to stand." On the allegations in this bill the plaintiff would be bound to prove a contract binding on the parties, and I think the allegations sufficient to support the proof that would have to be given.

Judgment.

I think the demurrer must be allowed with costs.

Re Curry.

Quieting Titles Act—Family arrangement—Will, construction of.

A testator who died in 1834, devised certain lands to his wife for life, and after her death to "his children, sons and daughters, their heirs and assigns for ever; to be equally divided among them, to share and share alike, after the said premises shall have been valued or appraised by two respectable and disinterested persons to be chosen by my executors hereinafter named, and after such valuation, I give, and it is my desire that the preference of the aforesaid premises shall be to the eldest of my sons, and should he not wish to take it, then to the next eldest, and so on until the youngest—for it is my most sincere desire that the paternal farm shall not be sold to any strangers—that after the valuation of the said premises, whomsoever of my sons who takes the possession, shall and will well and truly pay to all my children their respective shares, to commence one year after my decease, and so on until they are all paid, beginning with the eldest and finishing with the youngest * * * And whoever of my sons which will possess the farm aforesaid or parental farm, shall or will pay or cause to be paid to each of his sisters which are now living the full sum of £25 currency, in good and merchantable produce."

(*a*) Co. Litt. 303 *b*. (*b*) 21 Gr. 568.

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After making certain other specific devises and bequests the will concluded, "I do hereby give full power and authority to my executors hereinafter named, to convey, execute any deed or other necessary writings, for giving or granting any lands to my sons which I have heretofore mentioned."

By a codicil to the will the testator bequeathed to each of his daughters who should be living at his decease, and to a grandchild the sum of £75 to be paid, before the general division should take place between all his children as stated in the will.

The testator named his wife and his son, L., executrix and executor to his will. The widow died in 1839, and in the autumn of that year *L.* nominated two persons to appraise the land, and in compliance with such direction a valuation was then made, and one of the sons (*A.*) having accepted the offer of the land as directed by the will, immediately thereupon agreed to sell, and did sell the same to *L.* and another brother who subsequently assigned or released his interest to *L.*, and *L.* in the spring of 1840 went into possession, paid most, if not all of his brothers and sisters their shares, and remained in undisturbed possession until 1874, when he sold and conveyed to *C.*, who, in 1875, filed a petition for the purpose of quieting his title under the Act.

Held, (1.) that the acceptance by *A.* of the land according to the provisions of the will must be considered as a purchase by him under the scheme detailed in the will, and that it was not nominal and his brothers substituted for him; (2) that the direction to convert the real estate did not give the land the character of personalty till actually turned into money, and that the effect of the will was to create an express trust of the proceeds for the legatees; (3.) that even if the effect of the will was to constitute the son taking the land an express trustee thereof for the brothers and sisters, the conduct of the beneficiaries in lying by so many years, receiving payment from the brother, and in other ways recognizing his right to the estate, and allowing him without objection to deal with it was such as to preclude them from now asserting any claim, even although the statute of limitations did not apply; but that (5.) the facts stated shewed an actual sale by *A.* to his brothers in 1839, and then the statute of limitations began to run; (6) that the power of appointing persons to value the estate given by the will to the executors was not an arbitrary power depending on personal confidence, and that it was properly exercised by the surviving executor; (7) that the legacies given by the codicil did not form a charge upon the lands; and, (8) that the circumstances were such as warranted the Court in quieting the title under the Act without requiring the applicant to file a bill for the purpose of litigating the matters in question or obtaining the opinion of a jury thereon. *Quære*, in whom did the legal estate vest under the will? *Semble*, that it did not pass to all the children.

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Re Curry.

In proceeding to quiet the title the evidence established that in 1850 *L.* made a conveyance to one of his brothers of certain land, not that in question here, in which he described himself as surviving executor and trustee of his late father, as he was in fact.

Held, that this was not sufficient to render him liable as trustee for the contestants—his brothers and sisters, and those claiming under them—and he could not in any view be considered a trustee of the land for his brothers and sisters, and that in the absence of any proof of fraud the Court would not, after so great a lapse of time open up the family arrangements on the ground of mere inadequacy of value.

In the matter of the claims of the heirs-at-law of *Alexander Mailloux* and *C. J. Labadie* as assignee of the heirs-at-law of *Pierre Mailloux*, *Archange Marentette* and *Joseph Villaire*.

This was a proceeding under the Act for Quieting Titles. The petitioner and the contestants in the matter claimed title, respectively, to the lands in question, being lot 72, in the 1st concession, Sandwich, under the will of one *Joseph Mailloux*, deceased.

Statement.

A large amount of evidence was given as to the facts which took place upwards of thirty years ago, but there was very little, if any, conflict between the various witnesses on any matter of importance. The testator died in the year 1834, leaving a will, whereby he devised the farm on which he lived, being part of the land now in question (in the will called lot 71), to his widow for life, and after her death to all his "children, sons and daughters, their heirs and assigns forever, to be equally divided among them, to share and share alike, *after the said premises shall have been valued* or appraised by two respectable and disinterested persons to be chosen by my executors hereinafter named; and after such valuation I give, and it is my desire that the preference of the aforesaid premises shall be to the eldest of my sons, and should he not wish to take it, then to the next eldest, and so on until the youngest—for it is my most

1876. Re Curry. sincere desire that the paternal farm shall not be sold to any strangers—and after the valuation of the said premises, whomsoever of my sons who takes the possession shall and will well and truly pay to all my children their respective shares, to commence one year after my decease, and so on until they are all paid, beginning with the eldest and finishing with the youngest; one year to intervene between the payment of each heir." His chattel property he also bequeathed to his widow for life, and after her decease then the same was to be divided equally between all the children. The will then proceeded, " And whoever of my sons which will possess the farm aforesaid or paternal farm, shall or will pay or cause to be paid to each of his sisters which are now living the full sum of £25 currency, in good and merchantable produce.

Statement. I give and devise to each of my children, their heirs and assigns, share and share alike, that certain piece or parcel of land situate, lying and being, in the third concession, or Grand Marais, in the township of Sandwich aforesaid, with the exception of three acres in width by the depth of the same lot next the Honourable *Angus McIntosh's* line, which I reserve for the use and benefit of the one of my children who shall take the paternal farm in possession, his heirs and assigns for ever." The will also contained a devise of a lot to the testator's son *Louis Mailloux* on condition of his paying " to each of his sisters the sum of £75." The will then provided that the son who took the paternal farm should pay to *Archange Groux*, the child of a deceased daughter, £25, and further that she should share equally with the testator's daughters in all the " legacies " before mentioned. After making certain other specific devises and bequests the will concluded: " I do hereby give full power and authority to my executors hereinafter named to convey, execute any deed or other necessary writings, for giving and granting any

lands to my sons which I have heretofore mentioned. It is my full desire and will that my son *Joseph Mailloux* shall pay or cause to be paid unto all his sisters now living, as well as *Archange Groux*, wife of *Marentette*, the sum of £125 currency, to be equally divided among them, to share and share alike, or else, if the said *Joseph Mailloux* does not pay the said sum as my will is, then in that case he shall not inherit under this will and be totally excluded from the rest of the heirs." And the testator nominated his wife and son *Louis* to be executrix and executor of his will, which bore date the 27th of June, 1834. 1876. Re Curry.

By a codicil to the will, dated the 11th of July, 1834, the testator bequeathed to each of his daughters who should be living at his decease, and to *Archange Groux*, the sum of £75, to be paid before the general division should take place between all his children as stated in his will.

Shortly afterwards and on the 1st September, 1834, the testator died. Joseph, his eldest son, had predeceased him, leaving *Alexander*, his eldest son and heir-at-law, surviving. Of the testator's twelve children there were living at his decease four sons, *Antoine*, *Pierre*, *Charles*, and *Louis*, and three daughters, *Monique*, *Genevieve*, and *Angelique*. There were also living *Alexander*, the eldest son of *Joseph* and *Archange Marentette*, the grandaughter of the testator. The other children of the testator, namely, *Francois*, *Jean Baptiste*, and *Victoire*, all predeceased him unmarried. The testator's widow survived him about five years, she having died in 1837. During her lifetime nothing was done towards carrying out the testator's will. The will, however, was proved and letters probate granted on the 3rd of May, 1837, to the executrix and executor named therein. On the death of the widow in 1839, the surviving members of the family attended her funeral, and Statement.

1876. shortly afterwards a family meeting was held, at which the property of the testator, both real and personal, was divided. In the meantime, between the death of the testator and this meeting, the testator's daughter *Monique* had died without issue. *Genevieve* had also died leaving surviving her husband *Pierre Villaire* and *Joseph St. Louis* or *Villaire* her only child. There were, therefore, living at the time of the division, the testator's four sons *Antoine*, *Pierre*, *Charles*, and *Louis*; his grandson *Alexander*, the heir-at-law of *Joseph* the eldest son of the testator; and his daughter *Angelique Dequindre*, wife of *Charles Dequindre*, and *Archange Marentette*, wife of *Pierre Marentette*, a granddaughter, and *Pierre Villaire dit St. Louis*, the husband of the deceased daughter *Genevieve*, and her only surviving child *Joseph*.

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Of these the grandson *Alexander* died, leaving issue five children, who constituted one set of contestants. *Pierre Mailloux* also died, leaving issue, who had assigned their interest to Mr. *Labadie*. *Pierre Villaire* also died intestate, leaving *Joseph* his only child, who had also assigned to Mr. *Labadie*. The others, namely, *Antoine*, *Charles*, *Louis*, *Angelique Dequindre*, and Mrs. *Marentette* survived; the latter having also, as was alleged, assigned to Mr. *Labadie*, although this fact was not established in evidence.

Statement.

Mr. *Labadie*, therefore, represented whatever interest the children of *Pierre*, *Joseph Villaire*, and *Marentette* would, but for such assignments, have had in the land in question. The other contestants claimed whatever interest the testator's grandson *Alexander* died entitled to.

The petitioner, on the other hand, claimed to have acquired a title free from the claims of the contestants, both under the arrangement come to at the family

meeting above referred to, and also by virtue of a possessory title dating from the autumn of 1839 or spring of 1840. 1876. Re, Curry.

The contestants sought to impeach the proceedings at the family meeting, not on any ground of fraud, but on the ground that the arrangement then arrived at was not in accordance with the terms of the testator's will, and that some of the parties did not understand their rights under the will.

A great portion of the evidence given was as to what took place at the meeting in question, and some of those actually present at it were examined in reference to it. *Louis Mailloux* and *Antoine* were examined before the officers of the Court. From the evidence of these two it appeared that on the death of the testator's widow, which took place at the house of her granddaughter, Mrs. *Marentette*, the surviving members of the family were summoned to meet at the paternal house to settle the affairs. At this meeting the four surviving brothers were present: *Charles Dequindre* was there representing his wife, who was also present herself; *Pierre Marentette* also representing his wife. *Francois Xavier St. Louis* attended to represent his brother *Pierre*; and *Alexander*, the son of the deceased son *Joseph*, was also present. A person by the name of *Joseph C. Lewis* was called in by *Louis* to act as valuator; and at *Lewis's* suggestion another person named *William Hall* was called in to assist in the valuation. *Lewis* was represented as being an upright, respectable man, doing business as a conveyancer among the French inhabitants. He had acted for the testator, and his will was drawn by him, and he also witnessed its execution. All the members of the family appeared to have had confidence in him. *Hall* was also generally considered a shrewd man of business. In fact it would appear that *Lewis* and *Hall* were as good men as could have been procured in Statement.

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that neighbourhood at that time for the service required of them. On the first day of the family meeting all the personal property excepting some cash in a trunk was equally divided by lot, Mrs. *Marentette* and *Pierre Villaire* receiving an equal share with the brothers and sister. After the money was divided, on the second day of the meeting, *Lewis* and *Hall* were called upon to value the paternal farm, and they valued it at $1,600. *Alexander* was then asked if he would take it at that sum, and he declined it; it was then offered to *Antoine* who accepted it. According to *Francois Mailloux's* evidence he at first declined, and *Pierre* then agreed to take it, and then it was that *Antoine* retracted his refusal. *Francois* was at this time a lad of about 15 or 16, and this point of his evidence was not corroborated by that of the elder members of the family—except in so far that all agreed that, after *Antoine* had accepted, he offered to sell his right first to *Pierre*, and that the latter agreed to buy on the terms of paying the other heirs their shares of the $1,600 and giving *Antoine* for his share a farm at Stoney Point. He, however, required *Antoine* to give him $100 to boot. This *Antoine* refused, and he afterwards made a similar bargain with *Charles*, with the exception that he gave *Charles* nothing to boot.

Statement.

After *Antoine* had bargained with *Charles*, the latter spoke to *Louis*, and it was agreed that *Charles* and *Louis* should take the paternal farm between them; that *Charles* should give *Antoine* a farm at Stoney Point, valued at $200, for his share, and that they, *Charles* and *Louis*, should assume the payment of the other shares between them, *Louis* paying three and *Charles* two. Releases were then drawn up by *J. C. Lewis*, which were duly executed by all parties. Two of them were produced—one by *Pierre Villaire*, the other by *Charles Mailloux*—the latter dated the 9th of September, 1839, and the former the 10th of September,

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1839. *Charles Mailloux's* release was witnessed by *Lewis* and *Hall*, and the other by *Xavier St. Louis*. A receipt dated 10th May, 1842, was also produced, whereby *Pierre Marentette* acknowledged the receipt of $100 in full of all demands against the estate of *Joseph Mailloux*. The releases from *Alexander*, *Antoine*, *Pierre*, *Charles Dequindre*, and *Pierre Marentette*, were destroyed by fire at Windsor in 1871. It was shewn that although the releases were executed about the time of the family meeting, the moneys due to some of the parties signing them were not actually paid until some years after. The share of *Pierre Villaire* appeared never to have been paid in full. With this exception the evidence established clearly that all parties were paid the amounts due to them under the family arrangement. Under the arrangement come to in September, 1839, *Louis Mailloux* entered into possession as owner, in the spring of 1840, and occupied the property ever since until he sold to the petitioner in 1874. In the meantime no claim had been made adversely to the family arrangement, and no attempt had been made to set it aside ; all parties appeared to have been satisfied with it, until *Louis* sold to *Curry*, in 1874.

Statement.

The matter came before the late referee, *Holmested*, who, after hearing the evidence and reviewing all the facts of the case, ruled in favour of the title of the petitioner, concluding a very lengthened and exhaustive opinion, to which the reporter is mainly indebted for the foregoing statement of facts, as follows :—" It seems, therefore, too clear for argument that *Louis* sold the whole lot and not any particular shares in it, and that *Curry* was to quiet the title as to the claims of the other heirs than those last named, at his own expense, and that is all that *Louis* can have meant by his saying he only sold four shares. Whether there was any abatement in price or not for *Curry's* assuming this responsibility is immaterial, I think, to the present

1876. inquiry. If these contestants really have any claim
Re Curry. Mr. *Curry* may, perhaps, be bound to satisfy it; but the conclusion which I have arrived at is that none of them have any claim whatever, and that they—other than the infants — must pay the costs occasioned by their contestation. The claim of the contestant *Labadie*, I think, is not one that would be favoured in this Court, for if the parties whose claim he has bought really had the claims he contends they had, it is clear that he has become the purchaser thereof at a gross undervalue, for while he claims they are worth $2,750 each, he admits that he has only paid $500 to the children of *Pierre* and $500 to *Joseph Villaire*. How much (if anything at all) has been paid for Mrs. *Marentette's* claim does not appear; in fact, I do not find any evidence among the papers of any assignment at all from her to *Labadie*. A speculative purchase of this kind is not one that this
Statement. Court is accustomed to assist: See *Little* v. *Hawkins* (*a*), *Wigle* v. *Setterington*" (*b*).

From this ruling the contestants appealed.

Mr. *C. Robinson*, Q. C., Mr. *Hoskin*, Q. C., and Mr. *W. A. Foster*, for the appellants.

March 13th, 20th, and 29th. Mr. *Leith*, Q. C.. and Mr. *Alexander Cameron*, contra.

The appellants contended (1) that this was not a case to be proceeded with under the Quieting Titles Act, but that a trial before a jury or a formal hearing upon a bill was the proper mode of proceeding: that the fraud here asserted was not a clear case of fraud, but had been deduced from a long series of facts and arguments; and the evidence though satisfactory was certainly contradictory in parts, thus rendering the case proper to be

(*a*) 19 Grant 267. (*b*) 19 Grant 512.

inquired into by the Court upon a bill or by a jury. 2. That the testator had clearly expressed his intention as to the disposition of his estate, which intention had not been carried out, as some of the children had not been paid their shares. (3) That the price set upon the land ($1,600) was a grossly inadequate consideration for a farm of 360 acres. (4) That up to two years ago the land had been in the hands of a person willing to call himself and be treated as a trustee. (5) That the evidence shewed *Curry* was fully aware of all the circumstances connected with the title. (6) That *Labadie* was not a speculator; and further, that under the circumstances the parties were not called upon to declare whether they claimed to be entitled to the property as land or money—no offer of settlement in either view having ever been made by the petitioner.

Argument.

For the respondent (the petitioner), it was contended that the arrangement was, in fact, one made to quiet family claims, and, as such, in the absence of the clearest proof of fraud the Court would not at this late date disturb the settlement that had been made: *Cottle* v. *McHardy* (*a*), that the parties interested in effecting that settlement were not ignorant of their rights under the will, which or a probate of which was read over to all at the family meeting spoken of in the evidence, that all parties had acquiesced for so many years in what had been done in proceeding under the will, that it would now be a great hardship on the petitioner if the title thus acquired so long ago, should be disturbed or impeached in any way: that the valuation placed upon the farm must be taken and treated as an award between the parties beneficially interested, and after so many years it would be impossible to induce any Court to interfere

(*a*) 17 Gr. 342.

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with an award so made: *Brouse* v. *Stayner* (*a*) *Laing* v. *Matthews* (*b*), *Life Association of Scotland* v. *Siddall* (*c*), *Burrows* v. *Gore* (*d*), *Bailey* v. *Ekins* (*e*), *Bank of Montreal* v. *McFaul* (*f*), *Williams* v. *Williams* (*g*), *Wilde* v. *Wilde* (*h*), *Re Higgins* (*i*), *Cassie* v. *Cochrane* (*j*), *Clarke* v. *Hawke* (*k*), *Low* v. *Morrison* (*l*), *Franks* v. *Bollans* (*m*), *Jacquet* v. *Jacquet* (*n*), *Proud* v. *Proud* (*o*), *Graham* v. *Menceilly* (*p*), *Blain* v. *Terryberry* (*q*), *Young* v. *Wilton* (*r*), *Walton* v. *Saul* (*s*), *Knox* v. *Kelly* (*t*), *Burroughs* v, *McCreight* (*u*), *Little* v. *Hawkins* (*v*), *Wigle* v. *Setterington* (*w*), *Attorney General* v. *Payne* (*x*), *Hughes* v. *Kelly* (*y*), *Magdalen College* v. *Attorney General*, (*z*), *Attorney General* v. *Davey* (*aa*), *Kerr* v. *Leishman* (*bb*), *Ridout* v. *Howland* (*cc*), *Scott* v. *Scott* (*dd*), were, amongst other cases, referred to.

The other facts of the case appear in the judgment.

June 28th. Judgment.

PROUDFOOT, V. C.—*Joseph Mailloux*, who died 1st September, 1834, by his will, dated the 27th June, 1834, devised the land in question to his wife for life, "and after the decease of my said beloved wife, *Genevieve*, I give and devise unto all my children, sons and daughters, their heirs and assigns for ever, the above de-

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(*a*) 16 Gr. 1.
(*b*) 14 Gr. 36.
(*c*) 3 D. F. & J. 58.
(*d*) 6 H. L. C. 909.
(*e*) 7 Ves. 319.
(*f*) 17 Gr. 234.
(*g*) L. R. 2 Ch. 294.
(*h*) 20 Gr. 521.
(*i*) 19 Gr. 303.
(*j*) 20 Gr. 545.
(*k*) 11 Gr. 527.
(*l*) 14 Gr. 192.
(*m*) L. R. 3 Ch. 717.
(*n*) 27 Beav. 332.
(*o*) 32 Beav. 234.
(*p*) 16 Gr. 661.
(*q*) 11 Gr. 286.
(*r*) 10 Ir. Eq. 10.
(*s*) 1 Giff. 188.
(*t*) 6 Ir. Eq. 279.
(*u*) 1 J. & L. 290.
(*v*) 19 Gr. 267.
(*w*) 19 Gr. 520.
(*x*) 27 Beav. 168.
(*y*) 3 Dr. & Har. 482.
(*z*) 6 H. L. Ca. 180.
(*aa*) 4 DeG. & J. 136.
(*bb*) 8 Gr. 435.
(*cc*) 10 Gr. 547.
(*dd*) 6 Gr. 366.

scribed premises, to be equally divided among them, to share and share alike, after the said premises shall have been valued or appraised by two respectable and disinterested persons to be chosen by my executors hereinafter named, and after such valuation I give, and it is my desire, that the preference of the aforesaid premises shall be to the eldest of my sons, and should he not wish to take it, then to the next eldest, and so on until the youngest, for it is my most sincere desire that the paternal farm shall not be sold to any strangers; and after the valuation of the said premises, whomsoever of my sons who take the possession, shall and will well and truly pay to all my children, their respective shares, to commence one year after my decease, and so on until they are all paid, beginning with the eldest and finishing with the youngest—one year to intervene between the payment of each heir. * * * And whoever of my sons which will possess the farm aforesaid or paternal farm, shall and will pay, or cause to be paid, to each of his sisters which are now living, the full sum of £25 Provincial currency in good and merchantable produce. * * * I desire that the one of my sons who shall have possession of the paternal farm shall pay or cause to be paid to *Archange Groux*, wife of *Pierre Marentette*, of Sandwich aforesaid, blacksmith, the sum of £25 Provincial currency, in all kind of produce. And the aforesaid *Archange Groux* shall be considered in this my last will and testament as one of my daughters, and she shall share alike along with my other daughters in all the other legacies above mentioned. * * * I do hereby give full power and authority to my executors hereinafter named, to convey and execute any deed or other necessary writings for giving and granting any lands to my sons, which I have heretofore mentioned."

Judgment.

And he appointed his wife *Genevieve* executrix, and *Louis Mailloux* his son executor, of his will.

1876. Re Curry. The testator on the 11th July, 1834, made a codicil by which he ordered and declared that "all my daughters who shall be living at the time of my decease, as well as *Archange Groux*, shall be paid each the sum of £75 lawful money of Upper Canada by my executors in said last will and testament mentioned, before the general division shall take place between all my children, sons and daughters, as it is stated in my last will and testament."

The testator also gave his wife a life interest in his household furniture, farming stock and farming utensils, and after her death to be equally divided among his children.

The widow died in August, 1839. A few days after her death a family meeting, called by *Louis*, was held of the brothers, sisters, and sisters' husbands, at the old homestead. There were present: *Antoine*, *Pierre*, *Charles*, *Louis*, *Angelique* and her husband *De Quindre*. *Archange*, the grand daughter, does not seem to have been present, but her husband, *Pierre Marentette*, was. *Monique* and *Genevieve* were both dead at this time,—the former and her husband both died in 1838, intestate and without issue; the latter died in 1836, intestate, leaving her husband, *Pierre Villaire*, and a son, *Joseph Villaire*. *Pierre Villaire* was not present at the meeting, but sent his brother *Xavier* to represent him. If *Monique's* interest under the will was of the nature of real estate it passed to *Alexander*, the son of *Joseph*, who was the testator's eldest son—and he was present at the meeting—if the interest was personal, then it passed to her next of kin, who were present.

Judgment

On the first day of the meeting the furniture and loose property about the farm were divided. On the second day a sum of money found in the house was divided. On the first day *Louis Mailloux* named

1876.

Re Curry.

Joseph C. Lewis as one valuator and asked the persons present to name another. They did not know whom to name, when *Joseph C. Lewis* said to take Mr. *Hall*. *Louis* asked them if they were satisfied with Mr. *Hall*. They assented, and he was brought by *Louis*. The valuation was made on the second day at $1,600.

There is some conflict of evidence as to whether the will and codicil were read at this meeting. *Louis* tells us he summoned the relatives to hear the will read as well as to divide the property, and that the will was read by *Joseph C. Lewis*. This *Lewis* was an educated man, who seems to have done conveyancing and matters of a like kind ; he had the confidence of the people, and had done business for the testator. He drew the will and codicil, and was a witness to both. He has been dead some years. *Antoine* says the will was not produced ; that he never saw it or heard it read. But *Antoine's* memory is not very good ; for he says that *Archange Groux* was not then married to *Marentette* ; he afterwards says he is not certain. But it is clear that she was then married, and the widow died in her house. And he says that before his mother's death he knew that his father made a will ; shortly afterwards he says the first time he heard of it was at the family meeting The witness was a very old man—83—and this meeting took place thirty-six years before he gave his evidence.

Judgment.

Francois Mailloux, a son of *Pierre*, says, that he heard a part of the will read at the family meeting ; he came in while *J. C. Lewis* was reading it.

Angelique De Quindre was at the homestead when the family meeting was held, but she was not present with the men of the family at the family meeting. She never heard the will read. She left that to her brothers. *Charles De Quindre*, her husband was at the house at the time of this meeting ; but he was not in the same room

1876. with the family, and never heard the will read. *Archange Marentette* was not present at the family meeting, and never heard her grandfather's will read till a year or two ago; but her husband, who was present at the meeting, told her he had heard it read. Her husband was there to look after her interest. Probate was granted in 1837, and the codicil forms part of the probate.

Re Curry.

I think it has been established that the will was read, and that the family, or those whom they deputed to attend for them, did understand it.

Then what was the nature of the interest of the legatees in the paternal farm? Had there been an absolute direction to sell the farm and divide the proceeds among the children, then the case cited, *Franks* v. *Bollans* (*a*), shews that, until the conversion actually took place, the interest of the legatees was an interest in land and could only have been effectually bound by a deed executed under the Fines and Recoveries Act in England, or the substitute for it here; and so in regard to any dealings before conversion that a husband could not bind his wife; and supposing that case strictly to apply to the present, the selection of a valuator by and the receipt of the proceeds by a husband would not effectually discharge the land.

Judgment.

But this is of no importance if the surviving executor had the right to appoint the valuators, and I think he had. The appointment involved no personal discretion —it was not an arbitrary power depending on a personal confidence—it depended on the trust, and was intended in furtherance of it, and in such case the power survives. It is also in terms attached to the executors, and not to the individuals, so that it would seem to follow the office. Another reason is, that the division

(*a*) L. R. 3 Chy. 717.

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Re Curry.

was to be made after the death of the wife, the tenant for life ; and it is most probable that the testator intended the appointment to be made after the death of the wife. It is not likely he contemplated the appointment to be made during her life, to exercise the function after her death, and the wife was executrix, so that I conclude he intended the selection of valuators to be made by his son *Louis* (*a*). *Louis* seems to have proceeded with exemplary propriety in this matter. He consulted the wishes of the persons entitled, and acted upon them. Not a word is said injurious to the characters of the persons nominated. They were friends of the family, and all had confidence in them. The only objection to their proceedings is, that they are alleged to have valued too low. Now, at this distance of time, it is too late to question the propriety of the valuation. The parties were aware of it at the time, acted upon it, received payments under it, and cannot now be admitted to question it. It is well-known how difficult it is to come to anything like a reliable conclusion as to value at any specified date, unless there happen to have been purchases in the neighborhood at the time, and there are none such in evidence here. Besides value is to a great extent matter of opinion, and it is impossible to question that now with no allegation of bad faith on the part of the valuers.

Judgment.

There is a suggestion, indeed, that the value was placed low on account of the wish of the testator that the farm should not go out of the family ; but that was a matter of which all in their turn might get the advantage—they chose to submit to it, and it would be the grossest injustice to permit it to be impeached after nearly forty years' acquiescence.

Having arrived at the conclusion that the valuation

(*a*) Lewin on Trust, 3 Ed. 538.

1876. was proper, or cannot now be questioned, has the price been paid? or, if no, can it now be recovered?
Re Curry.

Antoine became the purchaser under the scheme detailed in the will. It was strenuously urged that he did not in reality become a purchaser, but was only nominally so, and that *Louis* and *Charles* were substituted for him. I think the fair deduction from the evidence is, that *Antoine* became the purchaser, and that he sold for value to *Louis*.

Antoine says that after the valuation the farm was offered to him at the valuation price, and he agreed to take it. Before he went home he had promised to divide the farm between *Charles* and *Louis*. They were to give him a farm for his share, and they were to take the paternal farm. *Charles* and *Louis* were to pay the others interested under the will the same as he was to do. They took upon themselves the same obligations he took upon himself. Before making the bargain with *Charles*, *Pierre* wanted to get the land, but would not pay the price, he would not give as much as *Charles*. *Pierre* offered him his farm at Stoney Point, but wanted $100 to boot. *Charles* offered his farm without demanding boot. *Antoine* arranged with *Charles* to take the eastern half of the paternal farm and gave him his farm at Point aux Roches in exchange, and besides he was to pay off four heirs. *Louis* was to take the other half and pay the other four heirs. He offered to sell the land to *Pierre* on the same terms as he did to *Louis* and *Charles*; offered it as many as ten times, but he would not take it at that price. *Pierre's* land in Tilbury West was of the same value as *Charles's*: it was of the same area and of equal value. He was not able to pay the heirs himself, and turned over his right to the farm to get the other heirs paid. It was not intended that the farm should go into his hands as a matter of form, and then into the hands of *Charles* and

Judgment.

Louis. It was intended for himself. He took it, because it was offered to him. He offered it himself to *Louis*. 1876. Re Curry.

The memory of this witness is not good, and many contradictions may be pointed out in his evidence; but there does not seem to have been any designed misstatement. His statements he corrects himself.

Louis says that *Antoine* took the land at the valuation when offered to him. When *Antoine* took the land he did so for himself; there was no understanding between him and *Louis* that he should take it for *Louis*. He thought *Antoine* took it for himself. He agreed to take half, and pay four shares. *Pierre* offered to give *Antoine* a farm at Stoney Point, but wanted $100 to boot. Both *Pierre* and *Charles's* lots were of about the same value: they were parts of the same lot and adjoined each other.

Judgment.

The conclusion I draw from the whole testimony on the subject is, that *Antoine* took for himself at the valuation; and that he sold to *Charles* and *Louis*. It was not simply a transfer subject to the same liabilities, but a negotiation for a consideration different from what he would have been entitled to under the will, a negotiation in which *Antoine* derived a benefit to the extent of $100 at least. And supposing that *Antoine* was bound, that a sale was made by him for valuable consideration to *Louis* in 1839, and that the Statute of Limitations then began to run.

Pierre Mailloux, *Charles*, *Archange* and her husband *Pierre Marentette*; *Alexander*, heir-at-law of *Monique*; *Pierre Villaire*, husband of *Genevieve*; and *Angelique* and her husband *Charles De Quindre* executed releases to *Louis Mailloux*, acknowledging the payment of the consideration money. These were all executed in 1839,

1876. and whether paid or not, must now be considered as paid.

Re Curry.

Another question was much agitated, viz., whether the devise in the will created only a charge or an express trust in favour of the legatees,—and in whom the legal estate was vested. In the view I have taken, that the legacies, or share of the produce of the land, must be taken to have been paid, it is not of much importance, perhaps, to consider this point; but it has not been overlooked.

The conclusion I have arrived at is, that the direction to convert did not, as I have already said, give to the land the character of personalty until it was actually turned into money; and that there was an express trust of the proceeds for the legatees. The direction in the will to have the land valued and to offer it at that price to the sons in succession, was in effect providing for a sale at that price. And the amount of the valuation was the proceeds of the sale, and brings the case within the line distinguishing a charge from a trust. *Mortlow* v. *Bigg* (*a*), *Watson* v. *Saul* (*b*), *Tiffany* v. *Thomson* (*c*).

Judgment.

But determining it to be a case of express trust does not decide in favour of the contestants, for the conduct of the legatees may have precluded them from asserting any claim, although the Statute of Limitations may not apply. An example may be seen in the case of *Mortlow* v. *Bigg* (*d*), on appeal. The Vice-Chancellor had held it to be a case of express trust of the property that remained *in specie*, but because the legatees had allowed the property to remain unsold for fifty years, and had permitted their legacies to remain all that time unpaid without requiring a sale or any formal security on the house, it was held that the devisees had elected

(*a*) L. R. 18 Eq. 246.
(*b*) 1 Giff. 188.
(*c*) 9 Grant 244.
(*d*) L. R. 1 Ch. D. 385.

to take the property as real estate, and that the assent of the unpaid legatees might be inferred. 1876. Re Curry.

But in the case of an express trust the right of any person claiming an interest shall be deemed to have first accrued at the time of a sale to a purchaser for value. The land was sold in 1839, and as to all who were not under disabilities the remedy has been long barred. *Archange Marentette* and *Angelique De Quindre* were the only ones under disabilities; the former continued so till 1872, the latter is still; but both have released, or their husbands have released, which after sale would be effectual.

It is difficult to determine whether the legal estate passed by this will, and in whom it vested; or whether it descended to the heir-at-law. I do not think it passed to all the children. There is ground for arguing that it passed under the will to that one of the sons who should elect to take the farm. There is also reason for holding that it passed to the executors and the survivor to enable them to convey to the sons. But I do not think it of much importance; for *Antoine* and his grantees have been in effectual possession since 1839. Judgment.

It was also urged that whether *Louis* were a trusteee or not he had acted as such, and could not now be heard to say he was not. *Life Association of Scotland* v. *Siddall* (*a*). The evidence of this is that on the 25th February, 1850, he made a conveyance to *Charles*, in which he described himself as surviving executor and trustee of the late *Joseph Mailloux* deceased, and as such executor or trustee granted certain land to *Charles*. He was surviving executor and trustee, but the land he purports to grant is not that in question

(*a*) 3 D. F. & J. 58.

1876. Re Curry. now. What must be established to render him liable is, that in respect to this land he acted or professed to act as trustee for the contestants, and I find no such evidence.

It was further contended that by the agreement with *Louis*, *Curry* was to pay the heirs something; that he took with notice of their claims and bound himself to liquidate them. The agreement is in writing and contains this clause, "Claims to the said lot have been formerly made by brothers and sisters of *Mailloux*, and it may be thought necessary to take proceedings to quiet the title to the lot. In that case *Mailloux* is to assist *Curry* by all legal and reasonable means in his power, of course at *Curry's* expense. The claims of *Antoine* and *Charles Mailloux*, and of *Angelique De Quindre* and her husband are to be obtained at *Mailloux's* expense." And one month later *Louis* executed a deed to *Curry* containing no stipulations on the subject. Some evidence was given to shew that by the agreement and deed *Louis* thought he was selling, and only intended to sell, four shares. The agreement gives no countenance to any such argument. Col. *Rankin* says *Louis* came to consult him after signing the agreement; told him what his bargain with *Curry* was; that *Louis* was only selling four shares, and then shewed him the agreement to know if it carried out the intention; *Louis* himself being unable to read or write. Col. *Rankin* perused the agreement and thought it an honest and straightforward paper, and in accordance with what *Louis* told him was the agreement. It is difficult to understand how he came to that conclusion, unless by supposing that the three titles to be obtained at *Louis Mailloux's* expense and *Louis's* own were all that were to be sold. But the prior part of the agreement relating to the quieting of the title applies to the whole, and while *Curry* agrees to do this at his expense, it acknowleges no right or interest in the persons who

Judgment.

had made claims. *Hector Prudhomme* was present at the execution of the deed. He says that when it was read he asked Mr. *Askin* why he had not put in the names of *Antoine*, *Charles*, and *Angelique De Quindre*, because *Louis* told him that morning he had sold only four shares, and because the paper was not made satisfactory to him (the witness) he would leave. And Mr. *Askin* replied that Mr. *Curry* was to settle for the three others. He (*Prudhomme*) witnessed the deed. 1876. Re Curry.

Albert Prince drew the agreement, and says that *Louis* thoroughly understood it. He explained it to him.

Louis, in his evidence—and he seems to have been considered by both parties as a respectable man, but very old and his memory not of the best,—says in one place that he sold to *Curry* the whole of lot 72, not merely his interest in it; that he told *Prudhomme* he was selling four shares, but the others were all paid; there were only the two payments to be made. "I think Mr. *Curry* was to make these payments, that was according to my agreement with Mr. *Curry*. I knew there were parties who made claims, but that there was nothing coming to them. In addition to the $22,000 received from *Curry* he also paid $1,000 to my son-in-law, *Lucier*, for a house he had on the lot; this was paid with my consent. I sold the land because I could make more out of the $22,000 than out of the land. I did not sell it because I believed there were honest claims against the land. When I sold to *Curry*, I told him I had got releases from all the heirs, and that some of these were burnt. When I told *Prudhomme* I had sold *Curry* four shares, I meant I had given him the signatures of four of the heirs, and he must arrange with the rest. I meant that I was to give *Curry* the signatures of *Charles Mailloux*, *Antoine Mailloux*, *Charles De Quindre*, and my own, so that we Judgment.

1876. could not claim; but if the others were to make costs Mr. *Curry* was to fight them himself. I considered they had no claim."

Re Curry.

Mr. *Askin* does not remember *Prudhomme* saying anything when the deed was executed. Mr. *Curry* does not understand French, but says nothing was said by *Prudhomme* as to shares. He authorized Mr. *Askin* to offer $24,000 for the farm.

Considering the danger of allowing written and sealed instruments to be qualified by such loose conversations, and that even these are capable of the meaning given to them by *Louis*, which makes them consistent with the written agreement,—and that *Louis* tells us he represented to *Curry* that all who once had claims had been satisfied, I think it is not established that *Curry* undertook to pay anything more than was expressed in the agreement, $23,000, and that this sum was the consideration for the whole farm.

Judgment.

By a codicil the testator ordered that all his daughters who should be living at the time of his decease, as well as *Archange Groux*, wife of *Pierre Marentette*, should be paid each the sum of £75 lawful money of Upper Canada, by his executors in said last will mentioned, before the *general division* should take place between all his children as it is stated in his said last will.

The land was to be valued and offered to the sons surviving, the one who took was to pay the valuation, and it was to be divided equally among the legatees; the chattels were also to be divided. The general division referred to must have been the division of the proceeds of the land and the chattels—the land itself was not to be divided.

I apprehend the legacies in the codicil therefore did

not form a charge upon the land. In the first clause of his will he directs that all his just debts shall be paid— no blending of legacies with them in the direction— and the whole structure of the will shows that it could not have been the intention to charge the land. The payment before the general division, if it has the effect of creating a charge, is clearly only a charge on the property to be divided, and that did not comprise the land.

If any of the legatees have not received their legacies and any right still remains to exact them, they may, perhaps, have a remedy by administering to the estate but cannot claim them as a charge upon this property.

It was argued that this was not a case to be disposed of under the Quieting Titles Act, that the evidence was so conflicting ; that so much depended on the credibility of the witnesses, that the case ought either to be decided by a jury or by the Court upon a bill : *Brouse* v. *Stayner* (*a*), *Re Lyons* (*b*). In the case of real conflict and of just cause of suspicion, I quite agree that the Judge who has to decide the cause should see the witnesses, and hear their evidence, and I would do nothing to derogate from that principle. But I see nothing in the evidence to lead me to suppose that any class of witnesses is not desirous of telling the truth. Some of them are very old, and some have died since their evidence was taken. A number of matters to which they testify took place nearly forty years ago. Others giving evidence on more recent occurrences, speak of conversations, perhaps only partly heard or partly understood. There are discrepancies, as might be expected in such a case, but not of a character to lead one to suppose they would be removed by another mode of examination.

Statement.

(*a*) 16 Gr. 1. (*b*) 2 Ch. Ch. 357.

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Re Curry.

Judgment.

Besides, some of the witnesses are now dead, and it would expose the claimants to the risk of serious damage, by quashing all the proceedings, which have already been taken at great expense, and I ought not to expose them to that chance unless under a serious conviction that the truth has not been reached. I have not that conviction.

The appeal is dismissed with costs.

The Grand Junction Railway Company v. Bickford. [In Appeal.] *

Railway company—Delivery of railway iron—Mortgage by company—Ultra vires.

By the charter incorporating a railway company, the company was empowered to borrow any sums of money necessary to complete, maintain, and work the railway, and "to hypothecate, mortgage, or pledge the lands, tolls, revenues, and other property of the company for the due payment of the said sums, and the interest thereon." The company entered into a contract with one *Brooks*, for the construction of the road, *Brooks* being bound to provide the iron for the purpose. *Brooks* thereupon entered into an agreement with *Bickford & Cameron*, who agreed to supply him with the iron necessary for the undertaking, which was to be paid for as delivered on the wharf at Belleville, by the promissory notes of *Brooks*, by which a credit of six months was to be given from the time of the several deliveries of the iron. In order to enable *Bickford & Cameron* to procure the iron, the Bank of Montreal had advanced the money necessary for the purpose, it being agreed that the bills of lading of the iron should be indorsed to the bank, and that the vendors should retain their lien until the iron was laid on the track; and *Brooks* agreed to obtain from the company an irrevocable power of attorney enabling the bank to receive certain Government and Municipal bonuses mentioned in the agreement between the parties: *Brooks* by the same instrument agreeing also to procure from the Railway Company a mortgage on the portion of the road then graded (about 44 miles) for $200,000, to be executed to an officer of the bank as collateral security for his said notes; such mortgage

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* *Present*—Draper, C. J., Burton, Patterson, and Moss, JJ.

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to form a lien on the railway as such, but not to contain any covenant for payment by the company; and it was shewn that *Brooks* had at this time done work on the road to an amount estimated at $300,000, but the company had the option of paying *pro rata* for the work as it progressed, or, of paying the whole contract price on its completion. On the power of attorney given by the company *Brooks* had indorsed a request to the company to execute the power covenanting that the granting thereof or anything contained in it should not in anywise prejudice, affect, or waive, or vary his contract with the company. A like request was indorsed on the mortgage with a similar stipulation, as to its effect on the contract, and it was proved in the cause that without obtaining such power of attorney and mortgage *Bickford & Cameron* would not have consented to supply *Brooks* with the iron.

The company accordingly, and in supposed pursuance of their charter, executed in due form such mortgage. *Bickford & Cameron* delivered the stipulated quantity of iron at Belleville, a portion of which was laid on the track, but default having been made in paying for the iron so delivered, the bank sold the iron remaining on the wharf for the purpose of realizing their lien. The company had filed a bill offering to pay what was really due under the mortgage and seeking to restrain the removal of the iron, but this relief was refused, and by consent a decree was subsequently made referring it to the Master to take an account of what was due to *Bickford & Cameron* in respect of such iron. The Master found due upon the mortgage $46,841.10, the price of iron actually laid on the track and interest; and that nothing was due in respect of the iron delivered at Belleville but subsequently removed, which finding of the Master was affirmed by the Court below, *Proudfoot*, V. C., holding that though the proviso in the mortgage was in its terms wide enough to sustain the contention of the mortgagee, yet that it must be taken in conjunction with the covenant indorsed upon it, and that the agreement, the power of attorney, and the mortgage must be read together: that so reading them the covenants on the power of attorney and on the mortgage, shewed that the company did not intend to assume any greater liability to *Bickford & Cameron* than they were under to *Brooks*; that the indorsements meant that the company should not be liable to pay more than might be coming to *Brooks*, nor until the terms on which it was to be payable were complied with; but on appeal this was reversed, this Court being of opinion that the delivery of the iron on the wharf at Belleville was sufficient to entitle the vendors to claim the price thereof. This Court, however, being of opinion that the mortgage which had been executed by the company was *ultra vires* and void, dismissed the appeal with costs, although the objection of *ultra vires* had been raised for the first time upon the appeal to this Court.

Semble, that even if the company had the power to create a mortgage

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for such a purpose they could do so only on the whole undertaking and this mortgage having been given on a portion of the road only was, therefore, void.

This was a suit to restrain the defendants *Bickford & Cameron* and *The Bank of Montreal*, from removing a quantity of railroad iron, alleged to have been delivered by *Bickford & Cameron* to the defendant *Brooks*, under a contract to do so made with *Brooks*, who had entered into a contract with the plaintiffs for the construction of their road. It appeared that under an agreement executed in June, 1874, between *Brooks* and *Bickford & Cameron*, the latter had agreed to furnish *Brooks* with 4,000 tons of rail at $47 a ton, on a credit of six months from the several deliveries of the iron, the periods for which were set forth in the agreement, *Brooks*, amongst other securities, agreeing to obtain an irrevocable power of attorney in favour of *The Bank of Montreal*, to receive the Government and certain Municipal bonuses mentioned in the bill—"the vendors to hold their lien and ownership on the iron till laid down on the track, when the several grants and bonuses are payable"—and agreeing also to procure from the plaintiffs a mortgage for a sufficient sum, say $200,000, on the railway, to be executed in favour of the officer of the Bank or his nominee as collateral security for the notes, which *Brooks* agreed to give for the iron as delivered, such mortgage to be first and only first security or charge on the road until discharged; and which mortgage was to create a lien on the railway as such security, but was not to contain any covenant for payment by the company.

Statement.

Brooks did accordingly sign a request for the company to execute a power of attorney and mortgage, and the same were accordingly executed to the officer of the bank. In pursuance of their contract, *Bickford & Cameron* did deliver at Belleville the amount of iron agreed for.

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To enable them to do this, *The Bank of Montreal* had advanced money to *Bickford*, he assigning to the Bank the bills of lading for the iron, of which fact both *Brooks* and the president of the company were aware, and the legal ownership of the iron remained in the Bank thereunder; but all the iron was delivered at Belleville for the purpose of fulfilling the contract. *Brooks* gave notes for the amount, but he having failed to complete his contract, *Bickford* sued for the notes and recovered judgment against *Brooks*. The company and *Brooks* being both insolvent, the Bank, under the power in their mortgage, duly advertised a quantity of the iron which remained at Belleville for sale, and did offer the same for sale by public auction, when *Bickford* became the purchaser thereof at $33.50 per ton, and he subsequently sold the same to another railway company, to whom he was about delivering it when the present bill was filed seeking to restrain the removal of the iron.

Statement.

Under these circumstances, on the 2nd of October, 1875, an application for an injunction was made before *Proudfoot*, V. C., when an order was made restraining such removal. On the 9th of October a motion was made for an order to continue the injunction, but this the same learned Judge refused to grant. Subsequently, and on the 18th January, 1876, the cause came on by consent, to be heard by way of motion for decree, when by consent a decree was made referring it to the Master to take an account of what was due to *Bickford & Cameron* under the contract. On the 9th of February the Master made his report, finding 46,841.10 due the defendants in respect of the iron laid on the track; but that nothing was due in respect of the iron delivered at Belleville and subsequently removed. The defendants claimed that they were also entitled to be allowed the sum of $13.50 per ton on the whole of the iron sold, being the difference in price agreed to be paid under the contract and the price realized for the same by auction,

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together with interest; and therefore appealed from the report of the Master.

The further facts of the case appear in the judgment.

Feb. 10th.

Mr. *Hector Cameron*, Q. C., Mr. *Boyd*, Q. C., and Mr. *Crombie*, for the appellants. The appeal in this case is principally on the ground that the Master in taking the account of the money due to the appellants under the mortgage should have charged the company with the price of the whole amount of iron delivered at Belleville pursuant to the contract, giving credit to the company for the amount realized by the sale mentioned in the pleadings, after default on the part of *Brooks* and the company; instead of which he charged them only with the quantity actually laid on the track. The company were fully aware of the terms of the contract entered into between the appellants and *Brooks*, as the substance of their agreement is set out in both the power of attorney and the mortgage which they executed; and it is admitted on all hands that the appellants have fully performed their part of the bargain; and as late as June, 1875, the company, after having cancelled the contract between themselves and *Brooks*, allowed *Bickford* to remove 500 tons of the iron upon the express promise that he would restore it when required to do so: and yet in the face of these facts they now wish to set up the defence that they never had the iron, at least more of it than that laid on the road. The mortgage specifying that the iron was to be subject to the lien of the vendors until laid on the track, when it was to become subject to the mortgage, could not by any rule of construction limit the liability of the company to the price of iron actually laid on the road. As to the effect of conditional sales reference may be made to *Benjamin* on Sales 653-680, *Page* v. *Cowasjee* (*a*), where all the pre-

Argument.

(*a*) L. R. 1 P. C. 127.

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vious authorities are reviewed. The vendor had a perfect right under the contract to proceed to a sale for the purpose of realizing his lien without giving the company any right to say the terms of the contract had not been fulfilled by the vendors—for we submit that as soon as the iron was delivered on the wharf at Belleville, a vested right of action arose between the vendors and *Brooks* ; and it is shewn in evidence that the company refused to allow *Bickford* to appropriate to other uses a thousand tons of the iron, although at the time there was more already delivered than could by any possiblity be laid before the opening of navigation in the spring, when the vendors would have other iron ready for the use of the company, which refusal by the company caused heavy loss to *Bickford*. In fact, the company have been adopting two very inconsistent courses of conduct : first, alleging that they had acquired the property in the iron, and now desiring to shew that they had not. The plaintiffs in order to restrict their liability in the manner proposed must either make out a case for reforming the mortgage, by limiting the amount ; or shew that there was really no consideration for the mortgage ; or, that there was no delivery of the iron because a lien was retained by *Bickford* and *Cameron*.

Argument.

De Colyar on Guarantee, pages 129, 131, 132 : *Exparte Agra Bank* (*a*), *Wood* v. *Tassell* (*b*), *Chitty* on Contracts, page 612.

Mr. *Bethune* and Mr. *Moss*, contra. In determining the rights of the several parties a reasonable construction must be placed upon this deed, and in doing so it will be necessary in order to arrive at a just conclusion to see if we can discover with some degree of certainty what the intention of the company was, in giving the security they did. Sub-section 11 of section 9 of the Railway Act defines the powers the several companies

(*a*) L. R. 9 Eq. 725. (*b*) 6 Q. B. 234.

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shall have of charging the property of the company. Here it is submitted that the contract, the power of attorney and indorsement, as also the mortgage and the indorsement on it, must all be taken and read together; and from a consideration of these it is apparent that it was understood and contemplated by all parties that *Brooks* was still to continue liable, to carry out and complete his contract with the company under which the latter were not to be liable for any sum until the whole work was handed over to them completed if they saw fit to avail themselves of its terms. They were not in any view to pay in anticipation of *Brooks's* contract, although they were willing to guarantee to *Bickford* and *Cameron* the price of any iron of which they actually received the benefit by being laid on their road. The defendants now ask, however, that the company shall be held liable for the iron, whether laid or not. Now, it is out of the question to believe that the company ever intended anything of the kind, knowing as they did the reduced state of *Brooks's* finances, and the danger there was, which was realized, of his failing to carry out the contract, and the work being left in an unfinished condition on the hands of the company. The true meaning of the arrangement is that so soon as the iron was laid on the track *Bickford* and *Cameron* lost the ownership of it; but losing this obtained the benefit of the mortgage security. The mortgage, we admit, was also to be good as a security to the extent of the several bonuses. Here the company was desirous of guarding against any liability except so far as was occasioned by their contract with *Brooks*, and for this purpose they had inserted a clause negativing any covenant on their part to assume any such, and in no event was the liability of the road to exceed $200,000, but no significance can be attached to the fact of this sum being named, as indicating that in any event and under all circumstances the company were bound to that extent.

Argument.

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It is not necessary, as suggested by the other side, to obtain a rectification of the instruments for the purpose of obtaining the object we have in view, namely, paying the value of what the company has actually received, as the practice of the Court enables us to give such evidence in the Master's office : *Penn* v. *Lockwood* (*a*), is a distinct authority on this point. Besides there is a stipulation in the mortgage itself to the effect that there shall be no liability either to the mortgagees or to *Brooks*, the contractor, on the part of the company; on the contrary the mortgagee was to have the remedy against the section of railway on which the iron was laid, and on that only. No question arises here as to customary or possessory lien, as the rights of the parties are distinctly stated and pointed out in the instruments themselves. It is futile to say that the delivery at the wharf was the delivery contemplated between the parties, for if that were the case, then on what ground was it that the Bank intervened to sell the remaining iron ? At law, no doubt, the legal ownership of iron is in the Bank, and the sale made by the Bank cannot be an ingredient in the determination of this appeal, especially in view of the fact that *Bickford*, who is so mixed up with, and may indeed be said to be the principal actor in these transactions, became himself the purchaser. In view of all the facts it would scarcely be reasonable to say that such a sale would be a proper test as to the market value of the iron alleged to have been sold. There is another ground on which the defendants must fail, that is, *Bickford* and *Cameron* did not perform their contract, as they had bound themselves to lay down the iron at Belleville free from any charge whatever ; when as a matter of fact, it was laid down there, the Bank had the right, if it chose, to dispose of it, and in reality there could not be any delivery to *Brooks* without the Bank first delivering it to *Bickford* and *Cameron*.

Argument.

(*a*) 1 Grant 547.

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Mr. *Hector Cameron*, Q. C., in reply. It was understood between all parties that the delivery to *Brooks* should not be an absolute delivery, as in such case it would have been liable to seizure for the debt of *Brooks*, a state of things which all parties desired to guard against. In other words the ownership of the iron was to remain in *Bickford* and *Cameron* until laid on the track, and as soon as that was done the mortgage would operate to bind it ; but still the delivery on the wharf at Belleville was made in pursuance of the agreement with *Brooks* and in full performance of its requirements. There may, in any case, be a qualified delivery: *Benjamin* on Sales, page 667.

March 15th.

PROUDFOOT, V. C.—Pursuant to a decree in this cause, the Master has taken an account of the amount due on the mortgage in the bill mentioned, and has found it to be $43,808.20 for principal money, being the value of the iron laid, or delivered to or for the plaintiffs' use, on the track of their railway, and the Master has certified that nothing is due on account of iron delivered at Belleville but since removed, and that 1,592 tons 755 pounds of iron rails and 136 tons 329 pounds of track supplies were sold and removed, and 450 tons of the rails and 10 tons 1,855 pounds of rails still remain on the wharves at Belleville, subject to the order of the defendants *The Bank of Montreal*. The Master further finds that the plaintiffs annulled the contract with *Brooks* for constructing the railway, on the 7th of June, 1875, on account of his failing to complete the road according to his covenant.

Judgment.

The defendants appeal from the report because the Master has not charged the plaintiffs with the whole of the iron delivered at Belleville and has given them credit only for the price realized for the iron sold by *The Bank of Montreal*, the contract price of the rails having been $47.50 per ton, and of track supplies $95.54 per

ton, and they were sold respectively for $33.50 and $50.50. 1876.

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By *Brooks's* contract with the plaintiffs he was only to be paid when the whole road was finished.

On the 30th June, 1874, *Brooks* made an agreement with the defendants *Bickford & Cameron*, for the purchase of the iron required for the laying of the track. For the price he was to have a credit of six months from the deliveries, but as the iron was delivered at Belleville he was to give his notes at three months, which were to be renewed for a like time, and he was to procure an irrevocable power of attorney to Mr. *Angus*, the Mannger of the Bank of Montreal, or other officer to be named by him, to receive the Government bonus and Municipal bonuses, the vendors to hold their lien until the iron was laid on the track, when the bonuses and grants were payable ; and *Brooks* agreed to procure from the Railway Company a mortgage for a sufficient sum, say $200,000, on the 44 miles of railway, to be executed in favour of *Angus* or his nominee as collateral security for the notes to be given as the iron was delivered, but this was only to be sufficient to create a lien on the road, and not to contain any covenant for payment by the Company. Judgment.

On the same day the Railway Company executed a power of attorney to *W. J. Buchanan*, authorizing him to receive and collect from the Government of Ontario all sums payable to the plaintiffs out of the Railway Aid Fund, and also to collect and receive the bonuses from Municipalities.

Brooks indorsed on the power of attorney a request to the plaintiffs to give the power of attorney, and covenanted that the granting of the power or anything contained in it should not in any wise prejudice, affect,

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or waive or vary the contract with the Company for the construction of the railway, but the same should in all respects remain valid.

On the same day the plaintiffs executed a mortgage to *Buchanan* reciting an agreement between *Brooks* and *Bickford & Cameron* of the 9th June, which was substantially the same as that of the 30th, for the purchase of the iron, and *Brooks's* agreement to give promissory notes for it as it was delivered, and the agreement of the plaintiffs to give the mortgage,—proceeded to grant the lands of the plaintiffs in the townships specified, and the track and right of way of the railway, subject to a proviso to be void on payment of all the promissory notes which *Brooks* should give under his agreement and the renewals thereof and interest, not exceeding in all the sum of $200,000; the understanding being that all moneys paid by *Brooks* on the contract in liquidation of the notes should be credited on the mortgage.

Judgment.

Indorsed on the mortgage was a request by *Brooks* to the plaintiffs to grant the mortgage to *Buchanan*, and an agreement by *Brooks* with the Company that the giving of the mortgage or anything contained therein should not prejudice, affect, waive or vary his contract with the Company for the construction of the railway, but it should contiue in all respects valid and binding.

The Bank of Montreal had advanced the money to *Bickford & Cameron* for the purchase of the iron, and had the bills of lading transferred to them, and retained their lien notwithstanding the delivery at Belleville, and when any delivery was to be made to *Brooks* their consent was required; and as neither *Bickford & Cameron* nor *Brooks* had paid for the iron, the Bank, for the purpose of realizing their lien, sold the iron that was carried off from the wharf at Belleville.

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I think the agreement, the power of attorney, and the mortgage, all formed part of one transaction, and are to be read and construed together.

The proviso in the mortgage to become void on payment of the notes given by *Brooks* for the iron delivered at Belleville is in terms ample enough to sustain the appellants' case; but it must be read in conjunction with the covenant indorsed on it, that the giving of the mortgage should not in any respect prejudice, affect, waive or vary *Brooks's* contract with the Company. A similar covenant is indorsed on the power of attorney, and this I take to be the true key to the construction of these instruments. They are all based on the proposition that the contract with the Railway Company was not to be affected or varied. I have no reason to suppose that the Railway Company meant to undertake any greater liability to *Bickford & Cameron*, or on their behalf, than they were under to *Brooks*; the power of attorney is given at the request of *Brooks*, the mortgage is also given at his request, and lest the execution of these should in any way affect the state of affairs between the Railway Company and *Brooks*, it is carefully provided that they shall not prejudice, alter or affect it. This means that the Company should not be liable to pay more than might be coming to *Brooks*, nor until the terms on which it was to be made payable were complied with. Now, the Company were not to be liable to pay *Brooks* until the road bed and track were finished, they were not liable to pay for a pound of iron till it was laid on the track. I consider the effect of the transaction to be an equitable assignment to *Bickford & Cameron*, or for their benefit, of what might become due to *Brooks*, and nothing more. The Railway Company stipulate their contract was not to be varied. *Bickford & Cameron* knew this, it was patent on the instruments; what right have I then to say that it shall be varied, that all

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the precautions taken to prevent it have been fruitless and unavailing.

In arriving at this conclusion, I think I am acting on that general canon for construction of agreements, viz: to construe them according to the intention of the parties; and no matter how general the language my be, or how ample the terms, they will be limited and controlled by evidence that they were intended to have a more limited effect. If the indorsements on the power of attorney and mortgage were not written for that purpose, I know not for what they were written. Why put them there at all unless they were to affect in some way the transaction—to guard against a contingency which has in fact happened—the failure of *Brooks* to complete his contract?

There is no better rule established than this, both in Courts of Law and Equity, that they will put a restricted construction on general language, when it appears on the face of the document that the general sense does not does not express the real intention of the parties (*a*).

Judgment.

No doubt all the parties thought that *Brooks* would be able to complete his contract, and in that case the mortgage would truly express the agreement; but the qualification by the indorsement must have meant to provide for the case of *Brooks* not carrying out his contract.

Were my construction of this agreement different from what I have just stated, there are other mattters discussed on the appeal, which would deserve great consideration.

Whether an agreement of such an unlimited character would not be beyond the capacity of the Railway Company to contract.

(*a*) *Pollock* on Contracts 414.

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The Con. Stat. Can., ch. 66, sec. 9, Art. 11, p. 753, enables them to borrow money for completing, &c., their railway, and to mortgage the property of the company for payment. Whether that would authorize a mortgage as collateral security for a contractor, and have the effect of making the company pay for iron that never reached their road at all, seems to me doubtful. Nor do I think the difficulty is avoided by saying that the decree referring it to the Master to take an account recognizes the validity of the mortgage. It might be good as to part and bad as to part.

Again, whether the sale by the Bank can be considered as a sale by *Bickford*, seems also doubtful. If it was a sale by the Bank, under a title paramount to *Brooks's* contract, then can *Bickford* be said to have fulfilled his contract with *Brooks*, so as to entitle him to sell at all ; and after *Bickford* purchased under the sale by the Bank, could any sale by him be deemed an exercise of his power under his lien ?

Judgment.

These and a number of other questions discussed on the argument I need not determine, for, on the grounds stated above, I am of opinion that the Master arrived at a correct conclusion.

The appeal is dismissed with costs.

The defendants *Bickford* and *Buchanan* thereupon appealed to this Court for the following, amongst other reasons, namely, that the said Court of Chancery should have referred the report back to the Master of the Court, and directed him to add to the amount found due by the plaintiffs under the said mortgage in the bill of complaint mentioned, the amount due from said *Brooks* to said *Bickford* for the remainder of the iron rails, track supplies, &c., delivered at Belleville, less the value of

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the portion thereof removed from Belleville by said defendant *Bickford* or *The Bank of Montreal*, because it sufficiently appears from the evidence before the Master, and upon the proper construction of the documents produced in evidence, that the said mortgage was intended to and did secure the whole of the iron and supplies delivered at the town of Belleville for said *Brooks* by said *Bickford*, and not that portion only which was actually received by the plaintiffs and laid on their track.

In support of the ruling of the learned Vice Chancellor the plaintiffs assigned as reasons: 1. That the construction placed by the Master of the Court upon the agreement between the parties as evidenced in all the documents is the true construction. 2. That the property of the respondents was not chargeable with any greater sum than that which was found by the Master's report to be due, and 3. That the respondents had no power to pledge their road except for the iron laid down.

Judgment.

The same counsel appeared for the parties respectively.

March 24th and 25th, and May 20th.

The same points were relied on as in the Court below. In addition counsel for the respondents contended that the mortgage was *ultra vires*, the company not having power to mortgage the property of the company except to secure the re-payment of moneys borrowed to make or maintain the road. They also contended that they had a right to impeach the instrument as void, and at the same time offer to pay the amount of money due in respect of the property of the defendants placed upon their road. *Penn* v. *Lockwood* (*a*), was clear on this point.

They referred also to *Hamilton and Port Dover*

(*a*) 1 Gr. 547.

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Railway v. *Gore Bank* (*a*), *Ford* v. *Beech* (*b*), *McLean* v. *Great Western Railway Co.* (*c*), *Gardner* v. *London, Chatham and Dover Railway Co.* (*d*), *Sterling* v. *Riley* (*e*), *Brownlee* v. *Cunningham* (*f*), *English* v. *English* (*g*).

In answer to this objection the appellants admitted that upon a mere matter of account, whether a mortgage is security for less or more, the Master is the proper officer to go into that on the evidence in his office; but this assumes a valid mortgage and a right to redeem upon paying what is due. If the mortgage is invalid, then the Court may impose equitable terms before setting it aside, such as paying what was advanced thereon; but it would be an abuse of language to say that this was redemption money. When a plaintiff pleads an effectual operative instrument he cannot be allowed to set up or contend that it has no operation at all: *Foster* v. *Beall* (*h*). Here, the bill asks the right to redeem, offers to pay what is due, and is entirely inconsistent with the position that the security is *ultra vires:* See *Warren* v. *Taylor* (*i*). Upon every reference to take mortgage accounts, it is competent for the Master to ascertain the real object for which it was executed if the mortgage has not been made for the purpose apparent on the face of it: *Sterling* v. *Riley* (*j*).

Judgment.

Penn v. *Lockwood* (*k*), cited by the respondents, does not apply here. There the plaintiff filed his bill to foreclose and the defendant did not answer. It was held that the Master was to estimate the true amount due, though the transaction was usurious in its inception, that defence

(*a*) 20 Gr. 190.
(*b*) 11 Q. B. 852.
(*c*) 33 U. C. Q. B. 198.
(*d*) L. R. 2 Ch. 201.
(*e*) 9 Gr. 343.
(*f*) 13 Gr. 586.
(*g*) 5 Gr. 580.
(*h*) 15 Gr. 244.
(*i*) 9 Gr 59.
(*j*) 9. Gr 343.
(*k*) 1 Gr. 547.

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not being set up. If it had been set up, the Judge said it would have been "the destruction of the plaintiff's claim." In that case the question was simply what sums were advanced: See *Elliott* v. *Henderson* (*a*), *Brownlee* v. *Cunningham* (*b*). But in this case the plaintiffs filed their bill as on a valid security, and cannot at this late stage change their ground of relief. Had they set up the *ultra vires*, they would, if successful, have destroyed the entire instrument and could not have redeemed. The objection of *ultra vires* should have been taken in the pleadings: *Proudfoot* v. *Bush* (*c*), *Cattanach* v. *Urquhart* (*d*).

The plaintiffs came in claiming to be allowed to redeem. The principle on which an equity of redemption is founded is relief against forfeiture; but how could the plaintiffs forfeit their rights under a security *ultra vires*: *Skae* v. *Chapman* (*e*). This shews their suit was never instituted with the idea of invalidating the mortgage as *ultra vires*. In an old but very strong case of *Smith* v. *Valence* (*f*), the Court made the plaintiff elect whether he would proceed to avoid the mortgage or submit to redeem.

Judgment.

Where a bill is filed to rescind an agreement, it is not necessary or proper pleading to offer to repay what has been advanced relying on the security: *Jarvis* v. *Berridge* (*g*). And Lord *Selborne*, L. C., at page 358, remarks, "There are cases, as of suits by mortgagors against mortgagees, in which plaintiff has no right to sue defendant at all except for purposes of redemption, and if he does not ask to redeem he is not *rectus in curiâ*." See also *Parker* v. *Alcock* (*h*), *Bazzalgath* v. *Battine* (*i*).

(*a*) 15 Gr. 642.
(*b*) 13 Gr. 586.
(*c*) 7 Gr. 518, 524.
(*d*) 6 Prac. R 28.
(*e*) 21 Gr. 534.
(*f*) 1 Rep. in Ch. p. 90, side p. 169.
(*g*) L. R. 8 Ch. 35', 357.
(*h*) Younge 361.
(*i*) 2 Sw. 164

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The Court will not examine the validity of a security as upon *ultra vires* in a case like this: *Scott* v. *Colburn* (*a*), *Moffatt* v. *Coulson* (*b*), *Fisher*, p. 250.

Recouping of moneys advanced allowed in *Ulster Road* v. *Banbridge* (*c*).

The judgment of the Court was delivered by

June 15th.

Moss, J.—This case comes before us upon an appeal brought by the defendants *Bickford* and *Buchanan*, from an order of *Proudfoot*, V. C., confirming the Master's Report.

Judgment.

Several questions were discussed at the bar, but before stating the conclusions at which we have arrived, it will be convenient to review the facts that appear to be most material. In 1872, the respondents, *The Grand Junction. R. W. Co.*, entered into a contract with *Alphonso Brooks* for the construction of a portion of their line of railway. The price agreed upon was $19,000 per mile; the mode of paying which is thus expressed in the contract. *i. e.*, "$6,000 per mile in cash, made up thus: government aid, $2,000 per mile, and the balance of said sum of $6,000 per mile, in municipal debentures at par, and cash, or either; also, $1,000 per mile in paid up stock, and $12,000 per mile in the first mortgage bonds of the Company at par."

It was agreed that the respondents should, as soon as the work was under progress to their satisfaction, create the necessary mortgage to the extent required by the contract, and issue bonds with coupons, but that the bonds should only bear interest from the date of their actual issue, and that the Company should have the option either of paying *pro rata* as the work progressed,

(*a*) 26 Beav. 276, *Fisher*, p. 250. (*b*) 19 U. C. R. 337.
(*c*) 2 R L Eq. 190

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or of paying the whole upon the completion of the work. *Brooks* proceeded with the performance of his contract, although somewhat slowly; and in June, 1874, had about 44 miles of the road graded. At that time a very large sum, amounting in round numbers to $300,000, was due to him from the Company. He had not, up to this time, succeeded in making any arrangements for procuring the necessary iron for laying the track, and until this was done neither the government nor municipal aid could be made available, and the further prosecution of the work was delayed. Both the Company and Brooks were undoubtedly anxious to effect arrangements, by which the supply of the necessary iron could be secured. Accordingly negociations were entered into between *Brooks* and the appellant *Bickford*, who is engaged in the business of furnishing rails. To these negociations the Company, through their President, were a party, and gave their approval. Before *Bickford* could undertake to procure the iron for the Company, it was necessary for him to arrange with the Bank of Montreal, for an advance of money to enable him to make purchases, and the Bank agreed to make an advance upon being secured by the delivery of the bills of lading of the iron. This was known to the Company's President.

Judgment.

On the 7th of June, 1874, a written agreement was entered into for the sale by *Bickford* to *Brooks*, of the iron rails required for the 44 miles already referred to, which was estimated at about 4,000 tons, and the fish plates, &c, The price of the rails was fixed at $47.50 per ton, and of the fish plates, &c., at the rate of 4¼ cents a pound, "all delivered on the wharf at Belleville, free of duties; *Brooks* to pay wharfage and harbour dues (if any); a credit of six months to be allowed, but the notes of *Brooks* at three months to be given and to be renewed for three months, interest being added to all such notes at 7 per cent per annum, to be given from time to time for the iron as delivered." *Brooks* also

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agreed to procure and give as collateral security for the notes an irrevocable power of attorney, authorizing an officer of the Bank of Montreal to receive the government and municipal bonuses; and to procure from the Company a mortgage for $200,000 on the 44 miles of railway to be executed to an officer of the bank as collateral security for the notes to be given as the iron was delivered. The agreement contained the following stipulation: "The said mortagage from the Company to be sufficient in law to create a lien on the said 44 miles of railroad, as security for the due payment of the notes of the said *Brooks*, but not to contain a covenant for payment by the Company." The mortgage was to be the first and only first security or charge on the 44 miles.

The Company's President gave a written approval of this agreement. On the 30th of June, 1874, a more formal document under seal was executed; but it did not vary in any material respect the terms of the previous agreement. On the same day, the Company executed a power of attorney under the corporate seal authorizing the appellant, *Buchanan*, who was the manager of the Toronto Branch of the Bank of Montreal, to receive the government and municipal aids, and to this power a copy of the contract under seal was annexed. Upon this document, *Brooks* indorsed a request to the Company, in the following terms: "I, *Alphonso Brooks*, named within, hereby request the *Grand Junction R. W. Co.*, to grant the within power of attorney to said *Buchanan* within named, and I hereby covenant and agree with the said Company, that the granting said power or any thing contained therein shall not in any wise prejudice, affect, or waive, or vary my contract with the said Company for the construction of their railway; but the same shall in all respects contiuue valid, anything herein contained notwithstanding."

Judgment.

On the same day an indenture of mortgage was executed by the Company under their corporate

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seal to *Buchanan*, by which, after reciting the contract for the purchase of the iron, and an agreement by the Company to execute the instrument as collateral security for the due payment of the notes to be given by *Brooks* for the price of the iron from time to time as it was delivered, which notes were to be received and held by the Bank of Montreal, the Company assumed to grant all the track and right of way and land taken and used by the Company, in and between the Town of Belleville and the Village of Hastings, with all the rights and privileges appertaining thereto, and the franchise and powers of the railway between Belleville and Hastings, subject to defeasance upon payment of the promissory notes, which *Brooks* should give in pursuance of the contract of purchase, not exceeding in all a principal sum of $200,000. The mortgage is expressed to be made in pursuance of the Act respecting short forms of mortgages, and contains a proviso authorizing the mortgagee on default, on one month's notice, to

Judgment.

enter upon and lease or sell the lands. It contains an express declaration of intention that it should operate as and be a lien on all that section of the Company's railway, to secure collaterally the payment of the notes referred to in the contract; and that in case of default, the mortgagee's sole recourse should be against the property included in the mortgage, and not against the Company for the amount of the consideration; and that it was not intended to give the mortgagee or the vendors any right of action against the Company in respect of the purchase money of the iron. Upon this is indorsed a written request by *Brooks*, exactly similar in effect to that previously extracted.

Bickford promptly commenced to deliver iron in fulfilment of his contract, the Bank making him the necessary advances and taking bills of lading of the iron. The iron was shipped to Belleville at various times, and delivered to wharfingers, who held it subject to the order

of the Bank. *Brooks* commenced to lay the track, but instead of using despatch, he was guilty of very great delay; and ultimately, after he had only placed iron upon the road from Belleville to Stirling, a distance of about 20 miles, the work stopped. 1876. Grand Junction R. W. Co. v. Bickford.

It is established by the finding of the Master, which, upon this point, stands unchallenged, that both *Bickford* and the Bank urged *Brooks* to proceed more rapidly with the laying of the track; and that neither of them put any difficulty in the way of his obtaining all the rails and track supplies necessary for the purpose. Indeed, by the end of navigation, upwards of 3,500 tons were delivered at Belleville, and the remainder was delivered immediately upon navigation being opened in 1875. It is plain that both *Bickford* and the Bank were extremely anxious that the iron should be laid as rapidly as possible. There is no plausible ground for the contention that they interposed any difficulties in the way of his receiving a sufficient supply whenever required. *Brooks* gave notes to the amount of $134,500 on account of the price of the iron, as it was delivered at Belleville, and these notes were left with the Bank as collateral security for the payment of the advances. Somewhat less than 2,000 tons of rails and a corresponding quantity of other supplies were actually received by *Brooks* and laid upon the Company's road. He made no payment to *Bickford* or the Bank, but $67,500 were received from the government and municipalities, and applied upon the promissory notes. Judgment.

On the 9th of June, 1875, the Bank manager notified the President of the Company that, unless the Bank were paid at once, a sale of the iron would be made. The President replied by letter stating that the contract with *Brooks* had been annulled, and asking delay to enable the Company to make fresh arrangements. On the 17th of June, 1875, the Company gave their con-

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sent to *Bickford* removing 500 tons of the iron, which had been brought to Belleville, on the understanding that the transaction should be treated as a loan made without prejudice to the rights of either party; and that the quantity removed should, when required, be replaced. Nothing more seems to have been done until the 9th of September, 1875, when, the Company not having made any arrangements for purchasing the remainder of the iron lying at Belleville, or for further prosecuting their enterprise, the Bank advertised the iron for sale by auction. On the 20th of September, the iron was offered for sale, and was knocked down to *Bickford* at $33\frac{1}{2}$ a ton, being $14 less than the price *Brooks* had agreed to pay. *Bickford* did not actually pay this price to the Bank, but having sold the iron to another Railway Company, he obtained the consent of the Bank to its removal for the fulfilment of this contract, upon an arrangement that the Bank should receive from the purchasers the moneys or securities to which *Bickford* would be entitled upon delivery. *Bickford* accordingly despatched schooners to Belleville to carry away the iron, and the Bank authorized the wharfingers to deliver it to those vessels, to be shipped to Port Stanley to the order of the Bank.

Judgment.

On the 2nd of October, the Company filed their bill setting forth the contract between themselves and *Brooks* for the construction of a part of their line, and the various instruments between *Brooks*, *Bickford* and themselves, which have already been described; and alleging that in pursuance of the contract, *Brooks* received the iron necessary to lay the rails over the portion of the track from Belleville to Stirling; that *Bickford* had delivered the remainder of the iron at Belleville, and had received the promissory notes of *Brooks* for the price; that judgment had been recovered upon these notes; that *Brooks* had ceased to work upon the road, and was in insolvent circumstances;

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that the Bank had pretended to sell the iron at Belleville to *Bickford*, although the Company had forbidden the sale; that *Bickford* and the Bank claimed to be entitled to remove the iron and to hold a lien under the Company's mortgage for the difference between the contract price and the price at which it was sold to *Bickford*; and that vessels had been sent by them to make such removal. The prayer was for a declaration that the iron had been delivered under the contract, and that the defendants were not entitled to remove it, and for an injunction against removal. The bill contained no offer to redeem. On the same day an injunction was obtained *ex parte* for a limited time, but on the 11th of October, the Court, after hearing argument, refused to continue the injunction. The learned Vice-Chancellor in disposing of the motion, held that the Bank had not in any way relinquished their original lien by assenting to the arrangement with *Brooks*; but he expressed an opinion that the Company were only liable for iron actually laid on the road.

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The Bank afterwards advertised in several newspapers their intention to sell on the 21st of January, 1876, under the power of sale in the mortgage, all the lands and premises therein comprised, and all the track and right of way and land taken and used by the Company, in and between Belleville and Hastings; and whatever title, interest, powers, and rights were vested in *Buchanan* under the mortgage. The Bill was thereupon amended by alleging that the greater quantity of the iron had been removed; that by the sale to *Bickford* and the removal, the Company had sustained great loss; and that the Bank were now threatening to sell. By the amended bill the Company submitted that the Bank were chargeable with the iron pretended to be sold to *Bickford*, at the price of $\$47\frac{1}{2}$ a ton, and were overpaid for the iron laid upon the track; that by the terms of the mortgage,

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and according to the agreement of the parties, the mortgage was only a security for the price of the iron laid down on the track; that by reason of the payment of its bonuses, the Municipality of Belleville had acquired an interest upon the Company's undertaking; and that no valid sale of the land and other advertised interests could be held under the power in the mortgage. It also contained an offer to pay what, if anything, might appear still to be due upon the security of the mortgage. The prayer was for an order for the discharge of the mortgage and the cancellation of the power of attorney, and the re-assignment of the mortgaged premises, and the right to receive the moneys not yet collected under the power, and for an injunction restraining the threatened sale.

The Company gave notice of a motion for an injunction, but before this was heard, a decree was made by consent of all parties, on the 18th of January, 1876, referring it to the Master to ascertain and state the amount due on the mortgage security, and to find the amount due for iron laid or delivered to or for the Company's use on the track; and also the amount due (if anything,) in respect of iron delivered at Belleville, but since removed, and ordering payment of the amount found due within thirty days after the making of the report, and that in default of such payment the mortgagee was to be at liberty to use all or any of his rights and remedies. Upon this reference *Bickford* brought in his account, charging the Company at the contract price with all the rails and other supplies delivered by him at Belleville, and crediting them with the $67,500 cash, and with the iron that had been removed, and that which still remained at Belleville, at the prices at which they had been knocked down to him at the sale in September. This was in effect charging the Company with the contract prices for what had been laid down upon the

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track ; and with the difference between these prices and the prices at the September sale, for what had not been laid down upon the track.

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The Master made his report on February 9th, by which he found that the amount due upon the mortgage security for principal and interest, was $46,841.10c.; that the amount due for iron laid or delivered to or for the Company's use on the track, was this same sum; that nothing was due on account of the iron delivered at Belleville, but since removed; that *Bickford* delivered on the wharf at Belleville, subject to the order of the Bank, 4036 tons of iron rails, and 295 tons of track supplies, the price of which at the contract price was $219,830; that 1983 tons of the rails, and 144 tons of the supplies were delivered to *Brooks* for the use of the railway under orders obtained from the Bank; that 1592 tons of rails and 136 tons of the supplies had been removed; and that 450 tons of rails and nearly 11 tons of supplies remained at Belleville, subject to the orders of the Bank; that on June 7th, 1875, the Company annulled the contract with *Brooks*, he having failed to complete the road according to his contract on the 1st of June, 1875, and the Company having previously remonstrated with him on account of his delay in prosecuting the work; and that in the months of July and September, when the rails and supplies were removed by *Lickford*, the value of iron rails did not exceed $33½ a ton, and that of supplies did not exceed $50½ a ton. From this report *Bickford* appealed. The appeal was heard by *Proudfoot*, V. C., and dismissed.

Judgment.

The learned Judge was of opinion that the proviso in the mortgage was in terms wide enough to sustain the contention of *Bickford*, but that it must be taken in conjunction with the covenant indorsed upon it,

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which has already been set forth, and that the agreement, the power of attorney, and the mortgage should be read together. So reading them he thought that this covenant and the similar covenant upon the power of attorney, shewed that the Company did not mean to undertake any greater liability to *Bickford* than they were under to *Brooks*; and that these indorsements meant that the Company should not be liable to pay more than might be coming to *Brooks*, nor until the terms on which it was to be payable were complied with.

He held the effect of the transaction to be an equitable assignment to *Bickford*, or for his benefit, of what might become due to *Brooks*, and nothing more. Entertaining this view, he deemed it unnecessary to consider the other questions discussed upon the appeal from the report; and upon this ground alone decided in favour of the Company.

Judgment.

The first question we have to consider is, whether, as a matter of construction, this was the proper effect to attribute to the mortgage. It was contended on behalf of the appellants that this case is not within the rule, by which general words may be cut down, or that which permits the Court to regard surrounding circumstances on account of some ambiguity of expression; and that, therefore, the language of the mortgage itself should alone be regarded in determining the liability of the mortgagors.

In the view we take of this first question, it is unnecessary to examine the arguments on which these propositions were rested, or the cases cited in their support, for even if the documents are all read together, they do not, in our judgment, bear the interpretation which has been placed upon them by the learned Vice-Chancellor. The original agreement of sale expressly stipulated for a mortgage as collateral security for the notes to be

given by *Brooks* as the iron was delivered. The mortgage recites in distinct terms the agreement of *Brooks* to give notes from time to time as the iron was delivered; and that of the Company to execute a mortgage as collateral security for the payment of those notes, so to be given for the price of the iron, and it contains an express declaration that the intention of the parties was that it should secure, collaterally, the payment of the notes agreed to be given by *Brooks*.

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No one can seriously doubt that this language, unless controlled by the indorsement, is sufficient to demonstrate an intention of giving *Bickford* security for the payment of what *Brooks* should owe him on the purchase money of the iron, not exceeding $200,000. Then in what way is its operation varied or its scope diminished by the indorsement? As we have seen, *Brooks* simply requests the Company to grant the mortgage; and agrees that compliance with his request shall not in any respect prejudice, affect, waive or vary his contract for the construction of the railway; but that it shall continue in all respects valid and binding. We are unable to perceive how this demonstrates any intention to reduce the engagement which the Company had entered into upon the face of the mortgage, or makes the mortgage simply equivalent to an equitable assignment of any beneficial interest to which *Brooks* might become entitled under his contract. If this was the real intention of the parties, they certainly devised a very complicated method for its expression and effectuation.

Judgment.

It is argued that unless the indorsement has this effect, it cannot be conceived what was its object. We do not think this is difficult to discover. By their contract with *Brooks* the Company were to give him a mortgage. The execution to *Buchanan* of the mortgage in question, was an apparent violation of this agreement

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The Company no doubt deemed it prudent, although under the circumstances it might not have been strictly necessary, to preserve evidence of his assent to the mortgage actually made, and thus to preclude even the possibility of his afterwards insisting that the Company had broken their part of the contract. This suggestion, we think, furnishes a simple and natural explanation of the indorsement, and adequately accounts for its appearance. It is certainly much more in accordance with the surrounding circumstances, which we are invited by the respondents to consider, than is the theory that the indorsement was made to guard against the contingency of *Brooks's* failing to complete his contract.

It seems an unlikely supposition that a shrewd man of business would sell so large a quantity of iron to a person, with the extent of whose means or ability to complete the work he was unacquainted, and at the same time consent that the value of the security which had formed the basis of negotiations should be depreciated by that person's failure to fulfil his contract. We are, therefore, of opinion that the construction of the mortgage is not altered by the indorsement, and that it must be construed as intended to secure, to the extent of $200,000, the due payment of the notes to be given by *Brooks* for the price of the iron, from time to time, as it was delivered.

Judgment.

But it was argued that in even that view the security appears to have been intended to cover only the price of the iron actually delivered into *Brooks's* possession, and not all the iron delivered at Belleville. Now it is to be observed that what is secured in terms is the payment of *Brooks's* notes. He actually gave notes from time to time, as parcels of the iron were delivered at Belleville, and without regard to the quantity which he had obtained for use on the road. He thus shewed in an unmistakable manner what was his understanding of

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the agreement; but the appellants contend, and rightly so, that if he gave more notes than required by his contract, this does not prejudice their rights. He was, however, to give notes from time to time, as the iron was delivered. The mortgage was intended to secure such notes as he gave in fulfilment of this obligation. The question then is resolved into this: When was the delivery made so as to entitle *Bickford* to demand notes? Was it when the iron was placed on the wharf, in pursuance of the arrangement made by all the four parties; or was it not until the Bank, which had the legal title, gave it into *Brooks's* possession? We think the terms of the agreement, when taken as a whole, leave no room for hesitation about the proper answer to be given. Clearly when it was delivered on the wharf at Belleville.

Judgment.

The argument for the other view was mainly founded upon the proposition that the mortgage was only to stand as a security after the government and municipal bonuses had been received; and, that as they were not demandable until the iron had been laid, the mortgage was not intended to be an effectual instrument before that was done. But we do not so read the agreement: what is said is that "the mortgage shall *ultimately* stand as security for the balance of the cost of the iron and material uncovered by the said bonuses." This certainly does not imply that it is upon the bonuses being paid or receivable the mortgage shall first become an effectual security. The expression "ultimately stand" does not suggest any such construction. Moreover, it had already been provided that the receipts from the bonuses should be "credited upon the amount covered by the said mortgage."

The circumstance that the agreement contains a covenant by *Brooks* with *Bickford* to commence immediate preparations for receiving and laying down the iron,

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and to complete the railway for the specified distance, so as to enable the Bank to receive the bonuses within six months from the first delivery of iron, was also relied upon as being inconsistent with the notion that the Company were pledging their property for the iron, before it was put into their road. We fail to perceive any such inconsistency. *Bickford*, for very obvious reasons, was anxious that the work should be prosecuted and completed without delay, and this attempt to stimulate *Brooks's* activity is by no means inconsistent with his desire to have all the security he could get for his iron.

But, even if these isolated circumstances were of more import than we think, they could not outweigh the other provisions of the agreement, which clearly and unambiguously point to delivery on the wharf at Belleville. What *Bickford* agreed to do was to deliver at Belleville. What *Brooks* agreed to do was, to give his notes at three months, from time to time, as the iron was delivered, with interest, and in such sums as required by *Bickford* up to the price of the iron and material then delivered. This could not mean that *Bickford* was to wait for notes, or that the liability of *Brooks* to pay interest was not to commence, until *Brooks* required the iron for the road. Indeed the whole scope of the agreement shews that the delivery to which it refers was the original delivery on the wharf.

Judgment.

These considerations dispose of the next argument of the respondents, namely, that there was no delivery, because the legal title was vested in the Bank under the bills of lading, and *Brooks* consequently could not take possession of the iron without their consent. From what has been said already, it will appear that this was the kind of delivery contemplated by the agreement of the parties. Upon this qualified delivery being made, the right of *Bickford* to receive the notes became com-

plete. The well-established principle that there is no delivery where a third person is in possession of the goods, unless he becomes bailee for the purchaser, is therefore not applicable.

It is unnecessary to inquire what would have been the consequence of a refusal by the Bank to deliver to *Brooks*, when he required iron for the road, because no such refusal was given. On the contrary, it is clear, from the evidence and the Master's finding, that *Brooks* had as great facilities for using the iron as if it had actually been delivered into his personal possession. The result is that, in our judgment, the mortgage, if otherwise unimpeachable, was, in its inception, a security for the payment of the price of the iron delivered at Belleville in fulfilment of the contract, subject only to deduction for any quantity that might be rejected by the Company's engineer.

Judgment.

We have next to consider to what extent this liability was affected by subsequent occurrences. On the 1st of July *Bickford*, under the authority of the president's letter of 17th June, to which reference has been made, took about 563 tons of rails and supplies. On the 20th September the remainder of the iron lying at Belleville was sold to him by the Bank, under the circumstances already detailed. The Master, in effect, has found that the values were the same in July and September, and that the prices at which the sale was made to *Bickford* represented the full values. *Bickford* claims that he is entitled to hold the mortgage as security, not only for the iron actually used upon the track, their liability for which the Company admit, but for the difference between the contract prices and these values.

The Company contend that if the sale was made by the Bank as pledgees, and for the *bonâ fide* purpose of realizing their claim, then *Bickford* did not fulfil his con-

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contract because through his act or default the iron was diverted from *Brooks*, who could no longer claim it under his contract, and that if the sale was not made for that purpose it was colourable, and cannot now be set up as the foundation of any claim.

We do not think that these contentions present much difficulty, but if there were any it was removed by the submission of the appellants' counsel, that the transaction should be treated as a sale made by a vendor who had not relinquished his lien, upon the purchaser not paying according to agreement. In other words, they submitted that the rights of the parties should be dealt with, as if the Bank had no lien and no connection with any part of the transaction, and as if Bickford, being an ordinary vendor, had assumed to sell over again. There is no room for doubt that this was the substantial character of the transaction. *Bickford* had sold to other parties, and the sale to him by the Bank was only a mode adopted for enabling him to complete the sale. His submission, therefore, is just and reasonable; but it has been further urged that, even upon that state of the case, *Bickford* cannot establish a claim for the difference between the contract price and the market value at the time of sale.

Judgment.

It is argued that this proceeding was a determination of the contract, and that the vendor can only recover for what had actually been received by the purchaser. We do not think that this contention can prevail. In *Page* v. *Cowasjee* (*a*), the previous authorities were considered and the correct doctrine enunciated.

The Supreme Court of Ceylon had held that the appellant, the vendor of a vessel, having wrongfully taken possession of and re-sold her, had deprived himself of the right to recover the price. This judgment

(*a*) L. R. 1 P. C. 127.

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was reversed by the Privy Council, the rule of law being thus formulated by Lord *Chelmsford*: "If, before actual delivery, the vendor re-sells the property while the purchaser is in default, the re-sale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price or to resist paying any balance of it which may still be due. If this is the case where the possession of property sold remains with the vendor, *a fortiori* must it be so, where there has been a delivery and the vendor takes it out of the possession of the purchaser and re-sells it." A cross action may be maintained by the purchaser to recover damages for the re-sale, and these are probably to be measured by the price that was realized.

From this it follows that *Brooks*, who was in default, would upon an equitable adjustment of accounts with *Bickford*, be debited with the contract price of the whole quantity of iron and credited with the value of that re-sold. This is precisely the claim which *Bickford* now makes against the Company.

Judgment.

This brings us to the consideration of the next point raised on behalf of the respondents. They contend that the report of the Master ought not to be disturbed, because the mortgage was *ultra vires*; and that while they do not seek to complain of his finding that there is due upon its security the price of the iron actually placed upon the road, the benefit of which they are enjoying, even this limited charge could not have been imposed, but for their submission, or possibly by force of the equitable doctrine, which we shall presently examine. To this the appellants at the outset oppose the objection that this question is raised too late to be now entertained. They urge that neither by the original nor by the amended bill is the validity of the mortgage impeached, but that on the contrary both

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are framed on the assumption that the whole transaction was legal. Certainly the pleader had not this point very clearly in view. The original bill claimed that by reason of the dealings between the parties, including this mortgage, the Company had acquired such an interest in the whole of the iron that the removal of a part of it was inequitable. This is obviously inconsistent with the position that they are only concerned with the portion which had then been laid upon the road. The amended bill submits that the mortgage is only a security for the rails and supplies laid down upon the track, but the reasons assigned for giving it this effect are its terms and the agreement of the parties, without any averment that the creation of such a mortgage for any purpose exceeded the Company's lawful powers.

Judgment.

Our attention was also directed to the averment or submission that no valid sale could be had under the power in the mortgage, but this seems to be founded, not upon any invalidity of the instrument itself, but upon the proposition that the Municipality of Belleville had, by reason of the payment of bonuses, acquired such an interest in the undertaking that the sale would be improper. On the whole, we could not say that the invalidity of the mortgage had been asserted in the Company's bill with sufficient clearness or precision to conform with the rules of pleading.

We are strongly inclined to think that the point at which the pleader was aiming was not the invalidity of the mortgage, but a limitation of its apparent effect. The bill, however, does contain a distinct offer to pay the amount that may appear to be due upon the security of the mortgage ; and the respondents urge that this makes it equivalent to a bill asking relief from the Court upon equitable terms. Their line of argument is this : We have thought proper to come into a Court

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of Equity to obtain some relief, which we believe to be for our benefit. We seek to get rid of a document which appears to have mortgaged to the appellants certain property, and to get back the right to receive certain bonuses, which we have authorized the appellant *Buchanan* to collect. In the course of the transactions we have received a benefit from the appellants through iron being placed upon our road We have submitted to such terms as may seem an equitable condition to the relief we seek; and the Court would have imposed as such condition payment for the iron, of which we are in possession.

It would certainly seem to be in accordance with the doctrines of abstract equity that if the Company, while asserting the illegality of the mortgage, sought any species of relief from the Court, it should only be granted upon their recouping the appellants to the extent of the benefit accrued from the transaction; and there are cases in which this condition of relief has been imposed in Chancery.

Judgment.

In *The Athenæum Life Assurance Company* v. *Pooley (a)*, a *bonâ fide* purchaser for value without notice, of certain debentures under the common seal of an incorporated joint stock company, was restrained from proceeding upon them at law, on the ground that their issue had been a fraud upon the Company, and that being choses in action, the purchaser stood in no better position than the original holder; but the Court gave the defendant the right to an inquiry whether the Company had received any benefit from the debentures.

In *Re Cork and Youghal R. W. Co.* (*b*), it was held that although the Lloyd's bonds issued by a railway company were illegal, and could not as such be en-

(*a*) 3 DeG. & J. 294. (*b*) L. R. 4 Ch. 748.

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forced against the company, yet the holders were entitled to be ranked as creditors to the extent to which the company had the benefit of the sums of money for which these invalid bonds had been given. Sir *G. M. Giffard*, L. J., thus explains the principle: "There is no ground whatever for the argument that a contract or instrument which fails in a Court of law, by reason of its illegality, can nevertheless be enforced in equity, because money has been paid and received in respect of that contract. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claims sought to be actively enforced on the footing of an illegal contract, the defence of illegality is as available in a Court of Equity as it is in a Court of Law."

Judgment.

A similar view was expressed by *Bacon*, C.J., in Bankruptcy, in *Re Durham County Building Society, Wilson's Case* (*a*), where a Building Society had illegally borrowed money and deposited title deeds with the lender. Other cases bearing upon this question are referred to by Mr. *Brice* in his treatise on *ultra vires*, pp. 517, *et seq.*

The appellants contend that even if the price of equitable relief were what has been indicated, the bill is faulty because it does not contain a sufficiently distinct offer to submit to those terms, or to such terms as the Court might think right to impose; and have referred us to *Parker* v. *Allcock* (*b*), and *Jervis* v. *Berridge* (*c*). In the former case, the bill was filed by an heir for the purpose of obtaining a declaration that he was entitled to his ancestor's estate which had been first mortgaged to secure money advanced for betting or gaming within the Statute of Anne, and afterwards conveyed absolutely for a consideration of which

(*a*) L. R. 12 Eq. 521. (*b*) 1 Younge, 361. (*c*) L. R. 8 Chan. 351.

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that money formed part. Upon demurrer, it was objected that the suit was useless, because if the statute operated, there was nothing in the defendants to convey, and that the bill was defective, because it contained no offer to repay the amount advanced. Lord *Lyndhurst*, C.B., said: "It strikes me that the principle is, that where a party files his bill, he submits himself to the jurisdiction of the Court and to all those terms which the Court may consider it equitable to impose upon him; and that it is not absolutely necessary for him to do so." The demurrer was overruled.

In the latter case, the bill was filed for the specific performance of a contract of purchase by the plaintiff from the Law Life Assurance Society, and to prevent the defendant *Berridge* from having the benefit of that contract under an assignment from the plaintiff. It contained no offer to repay *Berridge* certain sums which he paid the Society on the footing of the contract. Lord *Selborne* said: "Upon principle, there appears to be no good reason why a plaintiff in equity, suing upon equitable grounds, should be required to offer on the face of his bill to submit to those terms which the Court, at the hearing, may think it right to impose as the price of any relief to which he may be entitled." He further thought that at any rate such a submission might be implied from the ordinary prayer for general relief. But he pointed out that there are cases in which the plaintiff's right to sue is dependent on an election to forego legal rights for the sake of equitable remedies, as, for example, where the defendant has incurred a penalty, or where the controversy relates to usurious or other illegal transactions. In such cases the election, which is the foundation of the equity, must be declared in the bill.

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The position which the respondents now assume with respect to the illegality of the mortgage and their willing-

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ness to recoup the appellants to the extent of the benefit they have received, would seem to bring them within the latter class. It might be thought that a sufficient submission is made by the passage in which the plaintiffs offer to pay "what, if anything, may appear still to be due upon the security of the said mortgage;" but the context renders this doubtful. The prayer also contains an offer to pay "what, if anything, shall appear to be due upon taking the said accounts." This, however, is an offer which might be made in an ordinary redemption suit.

But it does not appear to us that it would serve any useful purpose to pursue the mere question of pleading any further. We have touched upon it rather out of regard to the earnestness with which it was pressed by the learned counsel for the appellants, than on account of the practical importance it seems to possess at this stage of the litigation. If the cause had proceeded in the ordinary course, the question would have formed a fit subject of discussion at the hearing, unless, indeed, the bill had been further amended. But instead of seeking an adjudication by the Court, the parties, probably with a view to greater expedition, consent to a decree; and it is by the terms of that decree they are now bound.

Judgment.

The question then is, whether under that decree the validity of the mortgage could be questioned for any purpose. The respondents contend that, although it may be that they would not have been allowed to object that it was *ultra vires*, in order to destroy it altogether, they were at liberty to urge this for the purpose of reducing the amouut due, and shewing that they were not chargeable with the difference claimed in respect of the iron removed. This, they argue, would under an ordinary decree directing mortgage accounts to be taken, be their right, by the settled practice in the Master's Office. In support of this view, *Penn* v.

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Lockwood (*a*), was cited. That was a common foreclosure suit, in which the defendant neither appeared nor answered ; and a *præcipe* decree was obtained with the usual direction for taking accounts. In the Master's office, the evidence adduced on behalf of the defendant established that the transaction was usurious, but the Court would not yield to his contention, that the mortgage was therefore void, because the effect of his non-appearance to the bill, was an admission of the matters that were sufficiently alleged in the bill to entitle the plaintiff to a decree. Nevertheless, he was held entitled to give the evidence for the purpose of reducing the amount of his liability. The Chancellor, by whom the judgment of the Court was delivered, said : "It is true that the defendant is not now entitled to set up the defence of usury for the purpose of entirely defeating the plaintiff's claim ; but where a plaintiff comes stating usurious transactions, it is the constant habit of this Court to receive evidence of such allegations, not for the purpose of destroying the security *in toto*, but in cutting it down to the amount really due. I can discover no principle upon which the same course should not be pursued under present circumstances. Had the defendant set up usury by his answer, the result would have been the entire destruction of the plaintiff's claim. Although he has not done so, and is now precluded from doing so for that purpose, I can discover no ground upon which he should be prevented from proving the usurious nature of the contract for the purpose of evincing the amount really due." This language seems to imply that, in the Master's Office a mortgagor who has not, before decree, impeached the mortgage on the ground of usury, is to be dealt with as if he had filed a bill for redemption ; in which case he would, by the course of the Court, have been obliged to waive the illegality, and to pay what was really due for money

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(*a*) 1 Gr. 547.

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advanced and legal interest. That case seems to have strong points of resemblance to the present, if the mortgage is *ultra vires* in the sense contended for by the respondents. In both, the objection would have been fatal to the mortgagee's claim, if used by way of defence; in both, it is omitted to be taken before decree; in both, it is afterwards sought to be used in reduction of liability.

It does not seem easy to find any solid ground of distinction between the two cases. The appellants suggest that there the mortgagor was defendant, while here the mortgagors are plaintiffs; but after decree, both parties are actors; and the plaintiff can scarcely be in a worse position upon such a consent decree, than the defendant upon a decree *pro confesso*. It is alleged, however, without denial, that the point was not raised even in the Master's Office, and that the Master must have proceeded upon the same view as that taken by the Vice-Chancellor. As we understand the practice, that does not necessarily preclude the objection from being now taken.

Judgment.

The Master having ruled in the respondent's favour upon certain grounds, it was not necessary to present before him other grounds, which might lead to the same conclusion. The course is, if such other grounds require further evidence to be adduced, to refer the report back to the Master for further consideration. Having this in view, we invited the appellants, when directing a re-argument, to suggest any facts which, if proved in the Master's office, might influence the decision upon the question of the validity of the mortgage, and some suggestions were accordingly made. As to these, it is sufficient to say that we think, for the purposes of our judgment, they should all be assumed in favour of the appellants.

We observe that this question was discussed before

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the learned Vice-Chancellor, who is very familiar with the practice, and he appears to have been of opinion that it was open to the appellants, and only refrained from pronouncing an opinion upon it because, for other reasons, he upheld the report.

There seems to be a special reason for holding that the point might be taken under the decree. What was the real controversy between the parties? Undoubtedly that of the Company's liability in respect of the iron delivered at Belleville, but not placed in the road. The decree contains an express reference to find "the amount due (if anything) in respect of iron delivered at Belleville, but since removed." *Due* by whom or in what manner? It must mean upon the security of the mortgage, because the company had excluded, by the instrument itself, any other kind of liability.

Judgment.

We do not see what there was to prevent the Company from contending that, although they were willing to let the mortgage stand as security for the iron received, they could not, against their will, be charged with the iron not received, inasmuch as the mortgage was *ultra vires*. This invalidity, if it exists at all, depends upon admitted or undisputed facts. It is a legal question arising on the very face of the instruments. It may not unreasonably be viewed rather as an additional argument that the mortgagee could not succeed in his claim with respect to the iron removed, than as a fresh point, and therefore should be open for consideration, just as in *Fitzmaurice* v. *Bayley* (*a*), the objection that a written agreement was insufficient to satisfy the Statute of Frauds, because it did not state the length of the term, was allowed to be insisted on even by the appellant, although not taken at the trial or raised in the argument below. *A fortiori*, must a similar opportunity be afforded to a respondent.

(*a*) 8 E. & B. 664, *Id.* 9 H. L. C. 78, 6 Jur. N S. 1215.

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In *Withy* v. *Mangles* (*a*), the learned Lords, after consultation, held the respondents, who were upholding a decree of dismissal, entitled to urge a new and important point.

For these reasons, we think that the respondents are not now precluded from contending that the mortgage is *ultra vires*; but, before passing from this branch of the case, we ought to notice the argument addressed to us by Mr. *Boyd* on the authority of *Scott* v. *Colburn* (*b*). He contended that that case went the length of holding that in a mortgage suit, where the mortgage appears to have been made by a corporation under its common seal, it is impossible to question its validity, but that an independent proceeding must be taken. It certainly seems to go far enough to make it worthy of examination.

Judgment.

In that case the directors of a company formed under the Limited Liability Act, 1855, were expressly prohibited by the deed of settlement from issuing or accepting bills of exchange. They had power to build, and for that purpose to enter into such contracts or arrangements with architects, builders, &c., as they might think proper. They had also power to borrow on mortgage £20,000 for the purposes of the Company. They entered into a contract with the plaintiffs for the erection of a building partly upon credit; and this contract was ratified by the Company under their seal. Upon the completion of their contract, a number of bills of exchange accepted on behalf of the Company were given for the balance remaining due. A mortgage of the company's property was also given to the plaintiffs as security for this balance, the defeasance of which was thus expressed: "subject nevertheless to redemption by the company on payment of the above mentioned thirteen bills of exchange, when and as the same shall become due." Upon the plaintiffs filing a foreclosure

(*a*) 10 Cl. & F. 215. (*b*) 26 Beav. 276.

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bill, it was objected that the mortgage was invalid on two grounds. The first was, that the mortgage being made for the purpose of securing payment of bills of exchange was void. This was overruled by the Master of the Rolls, who held that the mortgage was really given to secure the payment of the debt, and not bills of exchange. The second objection was, that there was no power to give a mortgage for an antecedent debt; and the Master of the Rolls was disposed to agree with that argument. He proceeded, however, to state that whether this was or was not a valid equitable charge, or whether the Company were to be estopped by the recitals, it was unnecessary to consider, because the legal estate passed by the deed. He then says: "It is not the deed of the Directors, but a conveyance to the plaintiffs by the Company, in whom the estate was vested to secure a debt due. The seal of the Company is affixed to the deed; then on what principle can it be stated that this deed did not pass the estate? Assume it to be fraudulent, still a bill must be filed to set it aside; and, therefore, in this suit, I am bound to assume its validity."

Judgment.

No doubt this is a strong decision, and if the language of the Master of the Rolls be correctly reported, he seems to have held that the validity of the mortgage could not be questioned by way of *defence*. It may be thought that it was not quite clear that the legal estate did pass, merely because the corporate seal was attached to the deed, as there remained behind the question, by what authority *was* the seal attached. If the instrument was completely *ultra vires*, the authority of the whole body of shareholders would not have made the deed otherwise than void. But without venturing to challenge the correctness of the decision upon this point, we are clearly of opinion that, according to the established practice in this country, it would not be necessary in such a case to file a bill. The objection could be

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perfectly well taken by way of defence to a foreclosure suit, and the decision to the contrary of the Master of the Rolls, must, we apprehend, have proceeded upon the more restricted range then permitted to answers in England.

We now come to the question of whether or not this mortgage is *ultra vires* of the Company. It may be convenient briefly to recapitulate the principal facts which relate thereto. *Brooks* by his contract was bound to furnish iron. The Company were to give him in part payment $12,000 per mile in first mortgage bonds at par-but were under no obligation to give a single bond until the completion of the work. He applied to *Bickford* to sell him the needed supply of iron. At this time *Brooks* had done a large amount of work, the estimates for which reached about $300,000, and the Company might, if it had chosen, have issued first mortgage bonds and delivered a large amount to *Brooks*. Negociations appear to have been actually opened with bankers for a financial operation, founded upon an issue of bonds, and intended to assist *Brooks* in effecting a purchase of iron. *Bickford* agreed to sell upon a mortgage of the portion of the road on which the iron was to be laid being made to his nominee as collateral security for payment, this mortgage to be the first and only charge upon that portion. He agreed to sell upon the faith of obtaining such a mortgage, and without it would not have dealt with *Brooks*. The President of the Company was actively engaged in inducing him to make the sale. The shareholders were made cognizant of this agreement, and agreed to the mortgage being executed. The mortgage is upon the lands and track, and right of way, and the franchise and powers of the Company appertaining to this portion.

Judgment.

The question seems to be divisible into two branches: firstly, could the Railway Company legally make a mortgage of this character and description; secondly, if they

could do so for any purpose could they do so for such a purpose as was proposed in this case?

We think that we ought, in favour of the appellants, to assume, if necessary, that every step was taken and every precaution adopted to make this instrument as effective as possible; and that the question should thus be narrowed to the consideration of whether the making of such a mortgage wholly transcended the powers of the corporation. If resolutions of a general meeting, or the consent of the whole body of shareholders, or acquiescence, or ratification can aid this mortgage, we think the existence of each and all of them should be presumed on this appeal.

The principles upon which the solution of this question must depend, seem now to be settled with tolerable clearness. In *Shrewsbury and Birmingham R. W. Co.* v. *Northwestern and Shropshire Union Railway and Car Co.* (*a*), Lord *Cranworth* uses the following language: "I agree to the proposition urged by the appellants that *primâ facie* corporate bodies are bound by all contracts under their common seal. When the Legislature constitutes a corporation, it gives to that body *primâ facie* an absolute right of contracting. But this *primâ facie* right does not exist in any case, where the contract is one which from the nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making; such a contract is said to be *ultra vires*; and the question here, as in similar cases is, whether there is anything on the face of the Act of incorporation, which expressly or impliedly forbids the making of the contract sought to be enforced," He cites with marked approval the language of Mr. Baron *Parke* in the *South Yorkshire R. W. and River Dun Co.* v. *The Northern R. W. Co.* (*b*), as a correct enunciation of the doctrine:

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(*a*) 6 H. L. at 135. (*b*) 9 Ex. at 84.

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"Where a corporation is created by Act of Parliament for particular purposes, with special powers, their deed, though under their corporate seal, does not bind them if it appears by the express provisions of the Statute creating the corporation, or by necessary or reasonable inference from its enactment, that the deed is *ultra vires*, that is, that the Legislature meant that such a deed should not be made."

In *Riche* v. *Ashbury Railway Carriage Co.* (*a*), *Blackburn*, J., says: "I do not entertain any doubt that, if on the true construction of a Statute creating a corporation, it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void; and to hold that a contract wholly void cannot be ratified." The decision in that case was reversed by the House of Lords, but in reversing their judgment, the Lord Chancellor approves of the language which we have cited. In the same case, the report of which is very instructive (*b*), Lord *Selborne* repeated what Lord *Cranworth* in a previous case had stated to be settled law—namely, that a statutory corporation created by Act of Parliament for a particular purpose, is limited as to all its powers, by the purposes of its incorporation, as defined in that Act.

Judgment.

In endeavouring to apply these principles, we propose, in the first place, to consider whether the purpose for which this corporation was created—namely, that of constructing and maintaining a line of railway between two points, is such as impliedly, and without any statutory reference to the subject of mortgaging, to contain a prohibition against the granting of a mortgage upon the track and right of way, and land taken and used by

(*a*) L. R. 9 Ex. at 262. (*b*) L. R. 7 H. & I. App. 653.

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it between one of those termini and an intermediate point, with the franchise and powers of the corporation between these two last mentioned points. There have been very many decisions in the various Courts of the United States upon this subject, and very conflicting judicial opinions pronounced. There is unanimity upon the point that without express legislative authority the franchises cannot be sold or mortgaged, but a great difference of opinion upon that of the power to mortgage the corporate property.

It appears to us that the weight of reasoning is in favour of the proposition that, even a mortgage of the corporate property could not be made without legislative authority. The reasons urged by *Hoar*, J., in pronouncing judgment in the case of the *Commonwealth* v. *Smith* (*a*) seem to us of much force as applied to the right of mortgaging the right of way and track, as well as the franchise. After admitting the rule to be, that general power to dispose of and alienate its property is incidental to every corporation not restricted by express legislation, or by the purposes for which it is created, the learned judge remarked : "But in the case of a Rail-road Company created for the express and sole purpose of constructing, owning, and managing a railroad ; authorized to take land for this public purpose under the right of eminent domain ; whose powers are to be exercised by officers expressly designated by statute ; having public duties, the discharge of which is the leading object of its creation ; required to make returns to the Legislature, there are certainly great, and in our opinion insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise

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(*a*) 10 Allen 455.

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to be a corporation clearly cannot be transferred by any corporate body of its own will. Such a franchise is not in its own nature transmissible. The power to mortgage can only be co-extensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure; and although the franchise, to exist as a corporation, is distinguishable from the franchises to be enjoyed and used by the corporation after its creation; yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property."

We way also refer to the pointed observations of *Foster*, J., in *Hendee* v. *Pinkerton* (*a*). The question was, whether lands which the Company had acquired, but which were not wanted for railway purposes, could be legally mortgaged. In the course of the judgment, it is observed: "The recent cases in which railroad mortgages have been adjudged invalid by this Court, do not countenance any doubt of the power of a Railroad Company to sell and convey whatever property it may hold, not acquired under the delegated right of eminent domain, or so connected with the franchise to operate and manage a railroad, that the alienation would tend to disable the corporation from performing the public duties imposed upon it, in consideration of which its chartered privileges have been conferred." The concluding sentence directs attention to the consideration which has been perhaps too much overlooked by the advocates of an opposite view; the difference between an ordinary trading corporation and a Railway Company with its exceptional powers and public duties. If this instrument is to prevail according to its tenor, the mortgagee is entitled to possession upon default, or to foreclosure. What is then to become of the land? Clearly the mortgagee has not acquired the franchise, and he therefore cannot carry on the business which

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(*a*) 14 Allen 386.

the Company was incorporated to transact. Can he be permitted to devote to such other purposes as he may choose the lands which have been taken from the proprietors under the powers conferred, and for the purposes contemplated by the Act?

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The language of Sir *Hugh Cairns*, when Lord Justice, in *Gardner* v. *London, Chatham and Dover R. W. Co.*, (*a*), furnishes an answer to this question: "When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public and as a road on which the Company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the Company, which Parliament has before it, and upon no other body of persons."

And again: "It is beyond question that the great object which Parliament has in view, when it grants to a railway company its compulsory and extraordinary powers over private property, is to secure in return to the public the making and maintaining of a great and complete means of public communication" (*b*).

Judgment.

But any doubt that might be entertained of the power of a railway company to mortgage its track, right of way and land, necessary for the working of the road, in the absence of any statutory provision, seems to us to be removed by the terms of section 9, sub-sec. 11 of the Railway Act, which is expressly incorporated with the charter of this Company. That sub-section authorizes the Company to borrow such sums of money as may be expedient for completing, maintaining, and working the railway, and to make the bonds, debentures, or other securities, granted for the sums so bor-

(*a*) L. R. 2 Ch. at 212. (*b*) Page 215.

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rowed, payable in currency or sterling, or inside or outside of the Province, and to sell the same, and "to hypothecate, mortgage or pledge the lands, tolls, revenues, and other property of the Company for the due payment of the said sums and the interest thereon; but no such debenture shall be for a less sum than one hundred dollars."

Now, the contention that the Company could mortgage without any legislative authority was founded upon the proposition, no doubt generally true, that corporations which have the right to borrow can give securities upon the assets to the lenders. But the Legislature seem to have acted upon the principle that that rule does not apply to railway corporations. If it did, what was the necessity of giving the power in the terms of the sub-section? If express power was necessary to entitle the Company to mortgage lands to persons who lent money, it could not be less necessary where the security was to be given in respect of other liabilities. The Legislature having expressly given the power to mortgage under particular circumstances, seems to us to have excluded the right to mortgage under other circumstances.

Judgment.

It appears to be the intention that bonds, debentures, or other securities (which must mean securities *ejusdem generis* as the two specified), should be issued for the moneys borrowed, and that a mortgage upon the property, tolls, and revenues of the Company might be made as security for the payment of these acknowledgments. We think that we discover in this a prohibition of a mortgage upon a portion of the line which the Company was constituted to build.

Again, the intention seems to have been that a mortgage might be given to secure a debt due by the Company, and for satisfaction of which shareholders might

be compelled to pay the amounts they had subscribed. Here it is expressly provided that the Company shall not be liable to any action for the amount of the claim the mortgage is given to secure.

We cannot help feeling that all parties concerned in this transaction knew that the object of this stipulation was to exonerate from liability persons who had subscribed for amounts of stock, which they did not desire to pay. The shareholders, while assuming to mortgage the lands they had been permitted to take from the proprietors, and the bonuses which had been bestowed upon them, on the faith of the Company having been duly organized and a certain amount of stock *bonâ fide* subscribed, carefully guarded themselves against being called upon to pay up this stock. We certainly do not feel any temptation to strain the construction of the statute, or to seek to enlarge the powers of the Company, in order to uphold such a transaction on the part of the shareholders, however willing we might be to assist *Bickford*, whose good faith there is no reason to call into question.

Judgment.

The mode of proceeding which the Legislature seems to have contemplated by the 11th sub-section, may be thus described: The Company may supplement the moneys received or receivable from subscriptions or stock, by raising a loan for the completion or maintenance of the road: and the repayment of this loan may be secured by a mortgage of the lands, tolls, revenues and other property of the company. The express purpose for which a mortgage is authorized to be given is the repayment of a loan of money.

The mortgage is intended, we think, to be operative upon the property of the Company as a going concern. Such a mortgage will confer upon the mortgagee certain well understood rights, among which is the appointment

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of a receiver. It is well settled that under such a mortgage, possession could not be taken by the mortgagee, nor a sale or foreclosure had at his instance. Thus, notwithstanding the giving of such a mortgage, the interest of the public in the working and maintenance of the road is provided for, because it is only by the road being placed and kept in a condition to earn surplus revenue that the mortgagee can obtain any benefit from having received security upon the property of the Company necessary to the working of the road.

This seems to us by necessary implication to prohibit the creation of a mortgage upon a part of the line only. The power to mortgage the property, which the Company is authorized to take compulsorily, and which is necessary for the enjoyment of the franchise, can only be exercised under and in accordance with the 11th subsection ; and this mortgage is not made in accordance with that section, for it is not given to secure a loan, and is given upon a portion of the line only.

Judgment.

Even if the Company had power to make such a mortgage as security for a debt, there was no debt of the company to be secured. *Brooks* was the only debtor, and they simply gave a pledge on a part of their road as collateral security that he would pay. Such an instrument seems to us to be utterly beyond the power of the Company, and to be invalid, if assented to or ratified by every shareholder.

We are of opinion that the Vice-Chancellor's refusal to increase the amount reported due upon the mortgage was well founded, and that the appeal should be dismissed with costs.

Mr. *Hector Cameron*, Q.C., under the circumstances of this case, and considering the fact that the defence of *ultra vires* has been set up for the first time on the

appeal to the Court, suggested that the proper course would be for the Court on dismissing the appeal to do so without costs.

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Moss, J.—That view had suggested itself to my mind when considering the case; but, on discussing the matter with the other members of the Court, the conclusion finally arrived at was, that costs should follow the result as usual.

Henderson v. Watson.

Interpleader suit—Practice—Prior action at law—Administration of Justice Act.

The plaintiffs having in their hands a sum of money, the proceeds of certain goods sold by them as auctioneers at the instance of one *W.*, but which was claimed by *B.*, the official assignee of one *H.* an insolvent, were ordered by the Judge in insolvency to pay the amount to *B.*, which they did, and notified the attorneys of *W.* of the fact, who thereupon proceeded with an action at law which he had previously instituted against the plaintiffs to recover this money. The plaintiffs thereupon claiming to be stakeholders only, filed a bill of interpleader against *W.* and *B.*

Held (1) that the plaintiffs, having already paid over the money to one of the claimants, were not in a position to call upon *W.* and *B.* to interplead; (2) that the plaintiffs' obvious duty, upon being sued at law, was to have pleaded the facts and applied to that Court, who would in a proper case have made an order allowing the money to be brought into Court, adding *B.* as a party to that suit, and discharging the plaintiffs here from further attendance therein, and directing *B.* and *W.* to test their respective claims to the fund so brought into Court; there being no reason why such proceedings should be an exception to that which has been laid down as the general rule introduced by the Administration of Justice Act, that wherever proceedings are commenced, there complete relief between the parties is to be worked out.

The bill in this cause stated that the plaintiffs were carrying on business in Toronto as auctioneers, and that on the 17th August, 1875, the defendant *Watson* had instructed them to remove certain household furniture

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belonging to one *Harvey* from his residence to the sale rooms of the plaintiffs, for the purpose of being sold by public auction; and the same were accordingly removed on the following day, when *Watson* expressed a wish that the goods should be sold as belonging to one *Bain*; and at the same time informed plaintiffs that he had a claim on the goods under a mortgage thereof from *Harvey*. Before the sale of the goods, namely, on the 20th August, an attachment was issued against *Harvey* at the instance of certain of his creditors, under the Insolvent Acts; and on the same day a note was sent by the Sheriff calling on the plaintiffs to deliver over the goods or pay over their proceeds to the Sheriff when sold. The goods were sold on the 20th of August, and realized, after the payment of rent and other charges, $867.12, which sum the plaintiffs held ready to be paid to the Sheriff or defendant *Watson*, of which fact the plaintiffs informed them. *Watson* insisting on payment, commenced a suit in the Court of Common Pleas to recover the proceeds of the sale. At the same time the defendant *Boustead*, as official assignee, insisted that the same should be paid to him, and he disputed *Watson's* right thereto on the ground that his chattel mortgage was void, and on the 27th of August *Boustead* obtained an order from the Judge of the County Court directing the plaintiffs to pay the money to *Boustead*, which they accordingly paid over to him and notified the solicitors of *Watson* that they had done so, who thereupon served the solicitor of the plaintiffs with a notice that they intended to proceed with *Watson's* suit against the plaintiffs. The plaintiffs claimed that *Watson* and *Boustead* should interplead, and prayed relief accordingly.

Statement.

The defendant *Watson* demurred for want of equity and for multifariousness.

Mr. *Bain* in support of the demurrer. We rely on four grounds. 1st. There has been an action com-

menced at law and the plaintiffs can there obtain all the relief to which they are entitled, if any; (2nd) The bill itself shews that the goods sold were received by plaintiffs as the agents of the defendant *Watson*; (3) That the money is stated to have been by the plaintiffs paid to *Boustead*; (4) Multifariousness.

In the first place, we contend that this is not a case for interpleading at all, and the first, third and fourth grounds, if tenable, are sufficient to establish this; besides, where one of the parties claims under a paramount title there cannot be any interpleader directed. Here the plaintiffs having received the goods as agents of *Watson* proceeded under the instructions given them to sell the goods and obtained from the purchasers the price thereof, which money it is shewn now forms the subject of a suit at Common Law; and no matter who may be the party ultimately declared entitled thereto the plaintiffs have already paid over the money, so that in fact there is nothing in respect of which the parties can be called upon to interplead. *Boustead* is now really making no claim to the fund, as it has been in fact paid to him, and this Court will not now compel him to refund it. Here there must be a trial between plaintiffs and defendant, not between co-defendants. To justify an order of interpleader being made the plaintiff must bring the money into Court.

Statement.

He referred to *Nicholson* v. *Knowles (a)*, *Crawshay* v. *Thornton (b)*, *Burnett* v. *Anderson (c)*, *Bignold* v. *Audland (d)*, *Fuller* v. *Patterson (e)*.

Mr. *Morphy* and Mr. *Boyd*, contra. The objection relied upon chiefly here is that the plaintiffs and *Watson*

(a) 5 Madd. 47.
(b) 2 M. & C. 1.
(c) 1 Mer. 405.
(d) 11 Sim. 23.
(e) 16 Gr. 91.

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were in the position of principal and agent; the case, however, is more like one of adverse claim. Here there certainly is a privity between the parties, as all claim title from one common source—the insolvent: *Simon* on Interpleader 6.

Both the parties claiming and interested in this fund are not before the Common Law Court, and therefore the plaintiffs were not put to raising any defence there, and *Boustead* has really no personal interest, being simply a trustee for distribution, and the payment to him was not a voluntary one but made in obedience to the order of the Insolvent Court.

Any person beneficially interested in a fund may interplead. Interpleader Act, secs. 2-3. They referred, among other cases, to *Davidson* v. *Douglas* (*a*), *Nelson* v. *Barter* (*b*), *Diplock* v. *Hammond* (*c*), *Sieveking* v. *Behrens* (*d*), *Crombie* v. *Jackson* (*e*), *Smith* v. *Cobourg* (*f*), *Best* v. *Heyes* (*g*), *Child* v. *Mann* (*h*), *Meynell* v. *Angell* (*i*), *Prudential Assurance Co.* v. *Thomas* (*j*).

And as to non-payment of money into Court by plaintiff, *Bell* v. *Reid* (*k*), *Mohawk & Hudson R. R. Co.* v. *Clute* (*l*), *Shaw* v. *Chester* (*m*), *Nash* v. *Smith* (*n*), *Anderson* v. *Calloway* (*o*).

Judgment.

BLAKE, V. C.—I think when the plaintiffs handed over the proceeds of the sale of the chattels they ceased to be stakeholders. Then the subject matter in respect of which the plaintiffs seek protection was gone; one

(*a*) 12 Gr. 181.
(*b*) 2 H. & M. 334.
(*c*) 2 S. & G. 141.
(*d*) 2 M. & C. 581.
(*e*) 34 U. C. R. 575.
(*f*) 3 Prac. Rep. 113.
(*g*) 3 F. & F. 113.
(*h*) L. R. 3 Eq. 806.
(*i*) 8 Jur. N. S. 1211.
(*j*) L. R. 3 Ch. 74.
(*k*) 6 Sim. 175.
(*l*) 4 Paige (U. S. R.) 384.
(*m*) 2 Edw. Ch. Rep. 405.
(*n*) 6 Conn. Rep. 421.
(*o*) 1 Dowl. 636.

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claimant was satisfied; there was no person to call upon to interplead with the unsatisfied claimant. It then became a matter simply between the plaintiffs and *Watson*, and under these circumstances I do not think a Court of Equity has the jurisdiction to interfere. The plaintiffs should have applied before the order was made against them; or, at all events, before they paid the money over. See *Fuller* v. *Patterson* (*a*), *Crawshay* v. *Thornton* (*b*), *Bignold* v. *Audland* (*c*), *Burnett* v. *Anderson* (*d*).

But whatever may be the true doctrine of the Court in regard to its interference in aid of a person claiming to be a stakeholder, in the present case I am bound to follow the decision in this Court of *McKinnon* v. *Boulton* (*e*). I understand that the decision in that case was based on this view of the result of the Administration of Justice Act as applied to such cases. When *Watson* sued at law the plaintiffs, they might in answer to that action have stated that they were stakeholders; were ready to bring the money into Court, and could not pay the plaintiffs at law safely, owing to the demand of the third party. Thereupon the Common Law Court could have made an order, if the case were one proper to grant relief in, allowing the money to be brought into Court, adding the third party as a defendant or plaintiff, discharging the present plaintiffs from further attendance before the Court, and directing the claimants to test their respective claims to the fund in Court. I entirely concur in this conclusion; nor do I see why the plaintiffs should object to such a course of proceeding being required of them. Mr. *Boyd* argued that

Judgment.

(*a*) 16 Gr. 91.
(*b*) 2 M. & C. 1.
(*c*) 11 Sim. 23.
(*d*) 1 Mer. 405.

(*e*) See also the *Imperial Loan & Investment Society* v. *Boulton*, ante vol. xvii., p. 121, where the same question as in *McKinnon* v. *Boulton* was raised, and the facts in that suit are mentioned.

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as in *Prudential Assurance Company* v. *Thomas* (*a*), an injunction was granted to restrain proceedings in a suit in equity by a stakeholder who was not a party to the first suit, this Court should restrain an action at law wherever the proceedings in which this relief was sought were in the nature of an interpleader. I can see no reason why such proceeding should be an exception to that which has been laid down as the general rule introduced by the Act in question, that wherever proceedings are commenced, there complete relief between the parties is to be worked out. In the present case there is no difficulty in the plaintiffs obtaining at as early a stage at law as in equity all that they can claim, and from their being relieved as fully in respect of the matters which are by their bill made the ground of their complaint. I think on reason and authority the only order I can make is to allow the demurrer with costs.

Judgment.

Menzies v. Kennedy.

Accommodation indorsers—Co-sureties—Assignment of securities.

The holder of several promissory notes applied to the plaintiff to indorse the same for his accommodation, which he did on the promise of the holder to execute a mortgage on certain lands to one *L.*, to whom he was indebted in $1,200 on account of the purchase money of these lands, securing the payment thereof, as also of the notes. The consideration expressed in the mortgage was $1,200 only, but the proviso for redemption embraced the notes as well as the $1,200. *L.* also indorsed the notes, and on maturity retired them, and the plaintiff having paid *L.* the amount of the notes, obtained from him an assignment of the mortgage:

Held, (1) that the transactions rendered *L.* and the plaintiff in effect co-sureties, and that the plaintiff was entitled to the benefit of the security held by *L.* by way of indemnity; and (2) that the plaintiff was entitled to enforce the mortgage against a purchaser who took his conveyance after searching the registry office and upon the assurance that the mortgage was made to secure $1,200 only.

By the decree in this cause dated the 28th of May,

(*a*) L. R. 3 Ch. 74.

1875, it was referred to the Master, at Hamilton, to inquire and find whether the plaintiff was entitled to recover as against the defendant upon the mortgage security and the several assignments thereof in the pleadings mentioned, and by whom the costs of the suit should be paid; and if he found in favour of plaintiff then to take the usual mortgage accounts. 1876. Menzies v. Kennedy.

The Master reported on the 2nd of December, 1875, that he found the plaintiff entitled to recover against the defendant upon the mortgage security and the assignments thereof in the pleadings mentioned; and that the whole of the plaintiff's costs of suit should be paid by the defendant; and he found due to the plaintiff $1,563.58.

The report was appealed from on two grounds: (1.) That the Master should have reported that the plaintiff was not entitled to recover against the defendant upon the said mortgage security and the assignments thereof; and (2), That the Master should have found that the costs ought to be paid by the plaintiff. Statement.

From the evidence taken before the Master, it appeared that *H. J. Orr* and *H. H. Spiers*, on the 18th December, 1872, made four promissory notes for $511, $500, $500, and $500, payable at six, ten, twelve, and eighteen months respectively from date to the order of *Edward E. Orr*.

That before the first note became due the plaintiff was applied to by *Edward E. Orr* to indorse them to enable him to get them discounted and wished him to go to Milton to see about it. The plaintiff and *Edward E. Orr* went that day to Milton, and went to the office of Mr. *Laidlaw*, an attorney, and the matter was talked over. *Laidlaw* advised the plaintiff not to indorse the notes, as they were for too large a sum. Finally he said

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he would negotiate the notes if *Orr* would give security for the payment of them; that in that case he would make the security available to the plaintiff, and in that way the plaintiff was induced to indorse them. The plaintiff was merely an accommodation indorser, and indorsed the notes that day. *Laidlaw* said he would indorse the notes, and in taking the mortgage he would make it available to the plaintiff. The mortgage was not to be made to the plaintiff, but he did not agree to indorse the notes before the mortgage was spoken of. The foregoing is from the evidence of the plaintiff. *Laidlaw's* evidence was that this agreement was come to within a week of the date of the mortgage, and that he did not indorse the notes till he delivered them to *Campbell*, who was to discount them, but, at all events, he did not indorse them until after the agreement was come to about the mortgage, though it was before the mortgage was actually given to him. *Laidlaw* told the plaintiff that with the mortgage he thought there would be no danger in indorsing the notes. The mortgage was given for the plaintiff's benefit as well as *Laidlaw's*; the mortgage was made for $1,200, and to secure the notes. This $1,200 was a debt then owing by *Edward E. Orr* for the purchase of the land.

Statement

The mortgage was dated the 30th of April, 1873, and recited the four notes as indorsed by *Orr* and *Menzies*, and delivered to *Laidlaw* to be discounted, and that *Laidlaw* at the request of *Orr* indorsed and negotiated the notes, and upon the treaty therefor it was understood and agreed that *Orr* should secure and indemnify *Laidlaw* as therein mentioned; and then in consideration of $1,200, and of the indorsement and negotiation as aforesaid, *Orr* granted the land to *Laidlaw* in fee with a proviso to be void on payment of the $1,200, at the times therein mentioned, and on payment by the said *H. J. Orr* and *H. H. Spiers* or the said mortgagor, (*Edward E. Orr*) of the said several promissory notes as they respectively became due and payable.

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The notes were produced and were indorsed as follows: "We indorse and waive presentment and notice of dishonor; signed," first by *Edward E. Orr*, then by the plaintiff, and lastly by *Laidlaw*.

The mortgage was duly registered on the 5th May, 1873, and afterwards the defendant purchased from *Edward E. Orr*, on the supposition that the mortgage was only for $1,200, misled it is said by an abstract of title from the registry office which stated the consideration for the mortgage to be only $1,200.

After the notes became due *Campbell* put them in the hands of a solicitor, who wrote to *Laidlaw* claiming payment, and he answered he would pay them. Before he paid them he saw the plaintiff and told him he would pay the money if the plaintiff would give him security. The plaintiff on the same day gave *Laidlaw* the note of himself and one *Early*. *Laidlaw* then paid the notes, and in a few days was repaid the amount by the plaintiff, and *Laidlaw* gave him an assignment of the mortgage.

Jan. 20th.

Argument.

Mr. *Maclennan*, Q. C., for the appeal.

Mr. *Bain*, contra.

Upon the argument it was admitted that the second question was involved in the first, for if the Master were right that the plaintiff was entitled to recover on the mortgage he was also entitled to his costs; so that only the first question remained for discussion.

For the appeal—while not disputing the general rule that a surety is entitled to all the securities in the hands of the creditor—it was contended that here the creditor had none; that it was in the hands of *Laidlaw* a subsequent surety and that it was a personal indemnity to him. That *Laidlaw* had not waived pre-

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sentment and notice before the notes fell due, and that a subsequent waiver would not prejudice the defendant. That the evidence of an agreement that the mortgage should be for the benefit of the plaintiff is unsatisfactory. That *Laidlaw* and the plaintiff were not co-sureties, and, therefore, that the plaintiff was not entitled to contribution from him nor to the securities he might hold. That *Ianson* v. *Paxton* (*a*), had decided that successive indorsers for accommodation are not necessarily to be regarded as co-sureties and so liable to contribution; but that in the absence of any agreement to the contrary the parties are liable in the terms which the note and indorsements are known to create; and that a prior indorser paying is not entitled to contribution from a subsequent indorser. It was also held there that parol evidence is, of course, admissible to shew that the indorsers contracted as co-sureties, and that their liability to each other as such was intended not to be controlled by the form of the instrument.

In addition to the cases mentioned in the judgment, counsel referred to and commented on *Irving* v. *Boyd* (*b*), *Copis* v. *Middleton* (*c*), *Hodgson* v. *Shaw* (*d*), *Cooper* v. *Jenkins* (*e*), *Batchelor* v. *Lawrence* (*f*), *Byles* on Bills, 215, 216, 293, 299.

Feby. 9th. Judgment.

Proudfoot, V. C.—I think the proper conclusion in this case, to be deduced from the evidence is, that the plaintiff and *Laidlaw* intended to be co-sureties. *Laidlaw* had held the notes for *Orr* for about a month before they were indorsed, and had advised *Orr* to get another indorser. The whole arrangement as to the indorsation of the notes was made by *Orr*, the plaintiff and *Laidlaw*, at a consultation when all were present. *Laidlaw* at first advises the plaintiff not to indorse, but when the mort-

(*a*) 22 U. C. C. P. 505, S. C. in App. 23 U. C. C. P. 439.
(*b*) 15 Gr. 157. (*c*) 1 T. & R. 224.
(*d*) 3 M. & K. 183. (*e*) 32 Bear 337.
(*f*) 6 Jur. N. S. 1306, S. C. 9 C. B. N. S. 543.

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gage was offered in security he tells him there would be no danger. The mortgage was made to *Laidlaw* for their joint benefit, and it was only on this understanding that plaintiff agreed to and did indorse. Both *Laidlaw* and the plaintiff prove this, and I take it to be clearly established that such was the design. There is no suggestion in the evidence that *Laidlaw* was to be only secondarily liable. The offer by *Laidlaw* to advance the money to pay the notes after they fell due is quite consistent with a joint liability.

In this view it is, perhaps, not very material to consider whether *Laidlaw* was relieved from liability to the creditor by want of presentment and notice of dishonour. For the plaintiff had waived that, and if he were made to pay the whole debt to *Campbell*, *Laidlaw* would still have been liable to contribute. But I am unable to see how it could have been a question whether *Laidlaw* had waived presentment and notice of dishonour, for the waiver is indorsed on the notes above the signatures of all three, and *Laidlaw* has not qualified his signature by anything negativing the waiver in regard to him. Independently of this, however, I conclude that *Laidlaw* by his conduct in regard to *Campbell* before the notes fell due had effectually waived any right to presentment and notice. He says it might have been a question, but my impression is there was no question. He had told *Campbell* when he discounted the notes that he held the mortgage to secure their payment by the makers and *Edward E. Orr*, and that he would not allow him to lose any money by the transaction. In truth he constituted himself a trustee of the mortgage for *Campbell's* security. After that he could not be permitted to say that absence of notice at the precise legal time would relieve him. Notice was given to him though not at the time requisite to hold an ordinary indorser liable.

Judgment.

The terms of the mortgage satisfy me it is, as it was

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intended to be, not merely a personal indemnity to *Laidlaw*, but a security for payment of the notes, and available for *Campbell*, *Laidlaw*, or the plaintiff, though the result would not have been different had it been for his personal indemnity. The recital is that *Orr* should secure and indemnify *Laidlaw* as thereinafter mentioned. The proviso is to be void on payment of the $1,200, and on payment of the notes by the makers or *Orr*; and *Orr* covenants with *Laidlaw*, his heirs, executors, administrators or assigns to pay the mortgage money and observe the above proviso.

The case then, in my opinion, resolves itself in the ordinary one of two co-sureties, one of whom has a security from a principal by way of indemnity; and according to well established principles the other has the benefit of it: *Swain* v. *Wall* (*a*), *Dering* v. *Earl of Winchelsea* (*b*). This right does not depend upon con-

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tract but upon the maxim that equality is equity, and it would be inequitable that sureties for the same debt should not bear an equal burden, or that one should be at liberty to relieve himself entirely or partially, from liability by means of a security from the debtor: See *Craythorne* v. *Swinburne* (*c*).

In my opinion the Master arrived at a perfectly accurate conclusion, and the appeal must be dismissed with costs.

(*a*) 1 Ch. Rep. 149.
(*b*) 1 W. & T. L. C. p 100.
(*c*) 14 Ves. 160.

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Baxter v. Kerr.

Municipal Councillors—Illegal by-law—Costs.

A ratepayer filed a bill in September, 1871, complaining of certain acts of the Treasurer and certain township councillors, done by them in the years 1867, 1868, 1869, and 1870, some of them under by-laws which the bill charged to be illegal, but which until the filing of this bill had never been objected to by anyone. Amongst other acts complained of the bill charged that the defendants had loaned the funds of the township upon improper and insufficient securities. After the bill was filed the moneys so loaned were all repaid, together with the interest, and the evidence in the Master's office established that these loans were the only instances of misapplication of the funds of the municipality. The Court, in view of the fact that the by-laws had never been moved against: that the defendants had not received any benefit under them peculiar to themselves and they had not been guilty of any fraud or impropriety in passing them, but, on the contrary, had acted with ordinary care and good faith, refused to make them answerable for the moneys expended under such by-laws, and directed the plaintiff to pay the defendants their costs of suit, less the sum of $150; which amount was to be borne one-half by the Treasurer, the other half by the township councillors; as on account of the nature of the questions in which the plaintiff had succeeded against them the Court could not absolve them from paying any portion of the costs.

Statement.

The bill in this cause (filed 15th September, 1871) was by *Thomas Baxter* against *William Johnson Simcoe Kerr, Robert Miller, Henry Foster, Daniel McLaren,* and *The Corporation of the Township of Nelson*—*Miller* being the Reeeve and *Kerr* Deputy Reeve, and the other two defendants Councillors of the township, and they formed a majority of the Council of 1867; *Miller* also professing to act as Treasurer of the township during the years 1868–9 and 70—and alleged that they had illegally dealt with the moneys of the township in several respects: amongst others that in 1867 the Corporation had suffered the other defendants to appropriate to their own use $1,000 and over, and unlawfully to expend $30 in the purchase of legal papers; $300 in gratuities to school trustees under a by-law of the muni-

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cipality (No. 154); $250 paid to one *Bray* and defendant *Kerr*, for the construction of sidewalks, drains, &c., in Wellington Square; $55 for the education of four children; $500 to several parties as alleged resident poor, and also to loan $400 to one *George Lee* without security: that in 1868–9 and 70 the defendants had allowed the defendant *Miller*, to act as Treasurer of the municipality without giving any security: that in 1868 *Miller* recived $10,000 and misappropriated large sums thereof: that in each of the said three years *Miller* had improperly paid to his co-defendants $500; in 1868–9 $100 each year for legal papers, and had loaned $500 to one *Allison* without sufficient security; and, also in each of those three years he had paid to Messrs. *Hunter & Curtis* $400 for the making of roads, &c., out of the township; also other $400 during the same period to Messrs. *Bray & Bastedo* for certain works in Wellington Square; also during each of those years $300 as gratuities to school trustees under the same by-law of the municipality (No. 154): that favourites of the Councillors had been employed to perform the services at extravagant prices; and as instances alleged that $40 had been paid to one *Stephen Smith* for work which was worth not more than $12 to perform; $78.33 to one *Dynes*, $55 to one *Brecon*, and $76.46 to one *Fleming* for performing work which was worth not more than half those sums. Also, that in each of those years $500 had been paid to one *Bowden* and others as resident poor of the township; that in 1869, $200 had been paid to one *Evans* for lodging forty-two strangers, and that in that year *Miller* had received $2,410 for the use of the schools, which he did not pay over until 1870, having used the amount himself meanwhile; that in 1870 $30 had been improperly paid to one *More* and his wife in order to their going to see their son; and that in the years 1868 and 1870 $2,000 had not been obtained from two of the collectors of the township named *Colter* and *Foster*, by reason of which the same became lost to the municipality.

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The bill further stated that prior to 1867 Clergy Reserve moneys had been wrongly invested by the defendants, and they had allowed the same to remain so improperly invested: part of the amount was loaned without any security: part on improper security: part deposited in *Miller's* own name, and part mixed up with and undistinguishable from his own funds: that in 1868, *Miller* lent to one *Patton*, his brother-in-law, $1,000 without security: to one *Colter*, one of *Miller's* sureties, $400 without security, and several other sums enumerated without proper security.

The bill further charged that the defendant *Miller*, as such treasurer had, in the year 1868 received from different sources mentioned, $12,772: in 1869, $7,668, and in 1870, $7,783, all which he neglected to invest and had converted to his own use: that *Miller* had kept the books of his office in a bad, defective, improper, and false state, and without the same being audited, and had by the other defendants been improperly permitted and suffered to do so. The bill prayed amongst other things that the defendants *Kerr*, *Miller*, *Foster*, and *McLaren*, might be ordered to pay into the treasury of the township all such moneys, with interest thereon, and to compensate the Corporation for all damages and loss occasioned by their conduct, and for other relief.

Statement.

On the 13th October, 1871, a decree was made referring it to the Master at Hamilton to make inquiries, and take the necessary accounts in the matter.

On the 5th May, 1873, the Master made his report, from which it appeared that the only instances proved before the Master of any mis-application of the funds of the municipality by the Treasurer (*Miller*) were having invested several sums out of the Clergy Reserve Fund account upon personal securities while by the Act appropriating the same (27 Vic. ch. 17) it was perfectly

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clear that such a dealing with these funds was contrary to the provisions of the Act. All these loans, however together with all interest accrued thereon had, since the filing of the bill been returned to the treasury of the municipality. It also appeared that certain moneys had been paid to the trustees of one school section instead of being apportioned among all the school sections in the township, and were so paid in compliance with certain by-laws of the municipality.

The points chiefly relied upon by the plaintiff on further directions were that the defendants *The Councillors* and *Treasurer* should be made personally liable for all the moneys which had been so improperly expended, and should be ordered to pay all the costs, notwithstanding the fact that the loans so improperly made had not resulted in any loss to the township.

Mr. *Moss*, Q.C., and Mr. *R. Martin*, for the plaintiff.

Argument.

Mr. Attorney-General *Mowat* and Mr. *G. A. Mackenzie*, for *The Corporation* of the township of Nelson.

Mr. *Boyd* and Mr. *Gibson*, for the other delendants.

In addition to the cases mentioned in the judgment the following authorities were cited and commented on by counsel: *Grier* v. *St. Vincent* (*a*), *Grier* v. *Plunkett* (*b*), *Carroll* v. *Perth* (*c*), *Sutherland* v. *East Nissouri* (*d*), *City of Toronto* v. *Bowes* (*e*), *Black* v. *Black* (*f*), *Re Doherty and Toronto* (*g*), *Malcolm* v. *Malcolm* (*h*), *Attorney-General* v. *Aspinwall* (*i*), *Parr* v. *The Attorney-General* (*j*), *Skinners' Co.* v. *The Irish Society* (*k*). *Dillon* on Corporations, page 298 note:

(*a*) 12 Gr. 330.
(*b*) 15 Gr. 152.
(*c*) 10 Gr. 64.
(*d*) 10 U. C. R. 626.
(*e*) 4 Gr. 489.
(*f*) 18 U. C. R. 362, 6 Gr. 1.
(*g*) 25 U. C. R. 409.
(*h*) 15 Gr. 13.
(*i*) 2 M & C. 618, 627.
(*j*) 8 Cl. & F. 409.
(*k*) 12 Cl. & F. 487.

826, 829, 830. *Lewin* on Trusts, 672–3. *Grant* on Corporations, page 138. *Spence's* Eqy. Jur. 32 and 35. 1876.

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BLAKE, V. C.—In passing the accounts before the Master in this case the plaintiff contended that the defendants, the Councillors, were not entitled to credit for certain moneys paid for school purposes, on the ground that the by-laws under which these payments were made were illegal. The by-laws were not moved against. No fault was found, until the filing of this bill, with the action of the Councillors, either in passing the by-laws or in paying money under them. These gentlemen have not received any benefit peculiar to themselves under the by-laws, they have not been shewn to have been guilty of any fraud or impropriety in passing them, but on the contrary they appear to have acted with ordinary care and good faith. I cannot find any authority, under these circumstances, where municipal Councillors are called to account years after a by-law has been passed; where such by-law has remained unobjected to and acted on; where there was no interest served in passing the by-law but the general good of the municipality they represent; where no moneys have been by them received under it, for making them refund moneys which they have allowed to be paid out thereunder. In *Kirby* v. *Bowbier* Chancellor *VanKoughnet*, it is true, ordered Councillors to make good money expended under an illegal by-law, which was not received by them. But there, there was no pretence of right for the act complained of. It was a fraud to have passed it; and on very plain grounds of reason they were prevented from alleging this fraudulent act as a defence to a demand for the payment of the money misappropriated under it.

Judgment.

In *Blaikie* v. *Staples* (*a*) an authority for the plaintiff in favour of his right to file such a bill as the present,

(*a*) 13 Gr. 67.

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the Court did not make an order against the defendants jointly for the payment of the moneys, which it was held they had improperly received, as would have been the case, in so far as the period is concerned when all the Councillors were members of the Board that passed the impeached by-laws if the liability was such as that here insisted on; but on the contrary, each Councillor was made liable, not for the amount paid out at the time he happened to be a member, but only for the amount actually received by him.

I have looked through the other cases cited, but find nothing in them to lead me to a conclusion different from that which I have above expressed.

For the reasons given at the hearing, I thought, although the plaintiff failed in the main matters on which he rested his case, yet on account of the nature of the questions in which he had succeeded against the defendants I could not absolve them from paying a portion of the costs of the suit as a punishment for conduct of which I could not approve, and which, if unnoticed, might be thought to receive the sanction of the Court. I then ordered that the plaintiff should be allowed only so much of the costs of the suit as related to the matters in which he had succeeded, to be taxed as against the defendants, against whom he had so succeeded in respect thereof; that to the defendants (except the Corporation) should be taxed the costs of the suit so far as they respectively succeeded, and that the costs thus taxed the defendants respectively should be set off against the costs taxed against each of them, and the balance borne by the party or parties, against whom it may be found. The plaintiff to pay the costs of the Corporation, and have over against the other defendants the costs of the Corporation in respect of the matters in which he has succeeded against the other defendants, but to bear himself all the other

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costs of the Corporation. I think, as a general rule it is most unsatisfactory to divide the costs, or to seek to work out the rights of the par ies in detail in respect thereof ; but here I do not see how it is possible for me to do otherwise where the case has been for a length of time in the Master's office, and there has been a large sum expended there. 1876. Baxter v. Kerr.

Subsequently the Vice-Chancellor said : I believe there would be so much difficulty in working out such a taxation that it will be better for all parties that I should order, as I now do, in place of the above direction, that the plaintiff do pay the defendants their cost of the suit : that the sum of $150 be deducted from the amount thereof, and that this reduction in the costs taxed be borne, one-half by the Treasurer and the other by the Councillors. Judgment.

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CAMERON v. KERR.

Insolvency—Mistake—Rectifying deed—Practice.

In proceedings in insolvency mortgagees claimed to rank upon the insolvent estate for the excess of their claim over the value placed by them upon the mortgage premises, after which they discovered that certain property intended to be included in the security had, by mutual mistake, been omitted therefrom, whereupon they filed a bill in this Court to have the mortgage rectified and the security realized.

Held, that the fact of the mortgagees having so proceeded in Insolvency, formed no objection to the relief asked, and the Court ordered a rectification of the instrument as prayed; as this was relief *dehors* the administration of the assets in which the Judge in Insolvency could not give adequate relief, remitting the parties back to the Insolvency proceedings with a view of the same, or a new value being placed by the mortgagees on their security, in order that the assignee and creditors might proceed under the statute; and in the event of those proceedings resulting in the security being retained by the mortgagees, the Court directed the bill to be retained to enable them to resume proceedings here to realize the security, for which purpose it would be necessary simply to file a petition stating shortly the proceedings taken and their result.

Statement.

The bill in this case was filed by *Archibald Cameron* and *The Merchants' Bank of Canada* against *John Kerr* and *Kenneth McKenzie Moffatt* setting forth that on the 26th of January, 1874, the defendant *Moffatt* and one *Lewis Moffatt*, and one *Lewis Henry Moffatt* executed a mortgage to the plaintiff *Cameron* as manager of *The Merchants' Bank* of certain lands situate in different parts of Ontario, and particularly mentioned and described in the conveyance, for securing certain advances to the said *Moffatts*, who had been carrying on business as *Moffatt, Bros. & Co.*; that one of the parcels B. in the said indenture mentioned by accident and mutual mistake was defective in the description and did not cover all the lands intended to be embraced therein; that the defendant *Moffatt* had retired from the firm before the execution of the said mortgage, and the remaining partners continued to carry on the business

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until the 12th of August, 1875, when, having become insolvent, they made an assignment under the Insolvent Act of 1869, to the defendant *Kerr*, an official assignee, who accepted the same, and was subsequently appointed at a meeting of creditors. The bill prayed that the mortgage might be reformed and rectified, and a declaration that the lands described in the bill were intended to be and were included in the said mortgage; a sale of the mortgage premises in default of payment and an order that the defendant *Moffatt* should make good any deficiency.

The defendant *Kerr* answered the bill admitting the error in the description of the premises, and claiming that it would be necessary to take an account of the indebtedness of the said firm at the time of the mortgage, as he believed that on taking such account a small balance only of that indebtedness would be found to be due. He also claimed that as to part the mortgage was void having been taken by the Bank for moneys advanced thereon, and not to secure a prior indebtedness.

Statement.

The bill was taken *pro confesso* against the other defendant.

The cause came on for hearing at the sittings of the Court at Hamilton on the 6th of April, 1876.

The plaintiff *Cameron* had been examined before one of the examiners of the Court previous to the hearing, and the defendant *Kerr* was called as a witness at the hearing, when the following, amongst other evidence was given by him, touching the claim of the bank in reference to the indebtedness of *Moffatt, Bros. & Co.*

Q. "What does the indebtedness consist of? A. Money borrowed on customers' notes. The Bank cannot file their claim until the notes mature. The notes are still

8176. Cameron v. Kerr.

running and are not paid up, but are in course of payment * * It was considered a fair security as regards the amount, the Bank was to be at liberty to amend the claim passed if found correct in every respect by the Inspectors. Q. Was any question ever raised about the security ; as to the value the Bank had placed on it. A. I do not think there was * * * I think the whole question of the Bank's security would have come up. Q. When was the claim to be settled ? A. Previous to the final dividend being declared. Q. You have not paid anything on the security. A. No, we supposed that the Bank's claim would be reduced in round numbers to $80,000 by payment of these customers' paper—that was the position it stood in. Q. That is, the claim was to stand unadjusted for the present so that you could determine what would be reeeived by the Bank from the unmatured paper ? A. Precisely. Q. The dividend would have been upon the claim as filed, $24,000 ; but the Bank accepted $18,000 on account of what the dividend would probably be if the customers' bills were paid up ? A. We supposed it was safe to pay that much. Q. Is the matter still in adjudication between the estate and the Bank ?. A. Until the amount of the Bank's ranking claim is determined ; we have certainly not gone into the question."

Statement.

In the Insolvency proceedings the Bank had filed a claim placing a certain value on the mortgage security, and seeking to rank on the estate for the balance of their debt.

Mr. *G. D. Boulton*, for the plaintiffs, proposed to take a decree declaring the Bank entitled to security on the mortgage for advances made previously thereto, contending that the estate was bound by the valuation placed by the Bank upon the security, the same not having been objected to by the assignee or inspectors, or by any of the other creditors within the time limited

for that purpose by the 62nd section of the Act of 1869 : referring to *Re Hurst* (*a*). The whole amount owing to the Bank has not been paid over simply because the Bank, as shewn by the evidence, are holders of notes of *Moffatt's* customers yet to mature : *Groves* v. *McArdle* (*b*), *Allan* v. *Garratt* (*c*). 1876. Cameron v. Kerr.

Henderson v. *Kerr* (*d*) shews that the plaintiffs are right in coming to this Court.

Mr. *Robertson* and Mr. *McMurrich* for the defendant *Kerr*. The relief was given in *Henderson* v. *Kerr* simply because the suit was for forclosure, and the plaintiff (the mortgagee) had not previously chosen the forum in which he would proceed. There was no finality as to the value placed upon the mortgage, as the whole is shewn to be in abeyance, and, therefore, no contestation was offered. Here, however, the Bank has elected to proceed in the Insolvency proceedings, and by that step they should be bound : *Crombie* v. *Jackson* (*e*), *Archibald* v. *Haldan* (*f*), *Dumble* v. *White* (*g*). Argument.

They also contended that under the 13 & 14 Vic., ch. 22, sec. 1, the Bank was not in a position to take this mortgage : *Stone* v. *Thomas* (*h*), *Commercial Bank* v. *Bank of Upper Canada* (*i*), *Martin* v. *Powning* (*j*), were also referred to.

Mr. *Mackelcan*, for certain private creditors of the insolvents.

Mr. *Boulton*, in reply.

(*a*) 31 U. C. R. 116.
(*b*) 33 U. C. R. 259.
(*c*) 30 U. C. R. 165.
(*d*) 22 Gr. 91.
(*e*) 34 U. C. R. 575.
(*f*) 30 U. C. R. 30.
(*g*) 32 U. C. R 601.
(*h*) L. R. 5 Chy. 219.
(*i*) 7 Gr. 423.
(*j*) L. R. 4 Chy. 356.

1867.

Cameron v. Kerr.

May 25th.

SPRAGGE, C.—Some questions were raised by Mr. *Robertson* on behalf of the assignee in Insolvency at the hearing of this case before me at Hamilton, and authorities were referred to, which I had not at the time an opportunity of examining.

The first question is, whether this Court has jurisdiction, or rather, perhaps, whether this is a proper case for the exercise of the jurisdiction of this Court. The suit is by mortgagees of real estate for the realization of their debt by sale of the property mortgaged to them. The mortgage was by *Lewis Moffatt*, *Kenneth McKenzie Moffatt* and *Lewis Henry Moffatt*, to the plaintiff *Cameron*, as a manager of the Merchants' Bank. The Bank claimed in Insolvency, valuing their mortgage security at a certain sum, and claiming for the balance of their debt. Part of the plaintiff's case is that certain parcels of land were by mutual mistake of the mortgagors and the Bank omitted from the mortgage, which

Judgment.

it had been agreed should be included therein, and that there was such agreement and mistake was established before me in evidence, and I held the Bank entitled to a rectification of the mortgage accordingly.

Of the three mortgagors two only—the first and third above named—went into Insolvency, and the bill prays for an order against the other mortgagor for payment of deficiency after sale. I have examined the cases on the question of jurisdiction referred to by Mr. *Robertson*. They were, with other cases referred to by my brother *Blake* in *Henderson* v. *Kerr* (*a*). It was contended by Mr. *Robertson* that the reasoning upon which that case was decided applied only to a suit by a mortgagee for forclosure, not to a suit for sale; but it is not so. It is besides quite clear that the Bank could not by proceedings in Insolvency obtain the other branches

(*a*) 22 Gr. 91.

1876.

Cameron v. Kerr.

of relief to which I have adverted ; and, as was said by Lord *Hatherley* in *Stone* v. *Thomas* (*a*), "If there is anything *dehors* the administration of the assets in which the commissioner (here the County Court Judge) cannot give adequate relief, recourse may be had to this Court. In the cases referred to in the U. C. Q. B. Reports, adequate relief could have been given in the proceedings in Insolvency.

The next question raised by Mr. *Robertson* was, whether the *Merchants' Bank* could take this mortgage security. Mr. *Boulton* proposes to take a decree for an account of what is due to the Bank in respect of advances made to the mortgagors prior to its date *i.e.*, up to the 31st of December, 1873. The mortgage is dated 26th of January, 1874.

Judgment.

I do not find that the *Merchants' Bank* stands upon a difficult footing from other banks in the matter of taking security upon real estate. Mr. *Robertson* refers me to section 1, of 13 & 14 Vic., ch. 22 ; but that Act is general, and section 1 authorizes banks to take the like security upon personal estate as they had theretofore been authorized to take upon real estate. This clause is re-enacted as sec. 4 in ch. 54 of the Con. Statutes of Canada, and its effect is to authorize incorporated banks to take, hold, and dispose of mortgages and hypotheques upon personal as well as real property by way of additional security for debts contracted to such banks in the course of their business.

The Act incorporating the *Merchants' Bank*, 24 Vic., ch. 89, after by section 21, prohibiting the lending of money or making advances upon real property, or upon certain descriptions of personal property, provides by the same section for the incorporation of section 54 which I have quoted above, into the Act of Incorpora-

(*a*) L. R. 5 Chy., at p. 224.

1876. tion. In the Act respecting the amalgamation of the Commercial Bank with the Merchants' Bank, 31 Vic., ch. 84, a clause to the same effect finds a place with an addition not material to this case. And further the *Merchants' Bank* is one of those to which the General Banking Act of 1871 (34 Vic., ch. 5) is made to apply; and that Act while prohibiting the loan or advance of money upon, *inter alia,* real est te authorizes the taking and holding of mortgages upon personal as well as real property by way of additional security for debts contracted to banks in the course of their business.

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The sixth paragraph of the answer of the assignee seems to place the question between the Bank and the insolvent estate upon a correct footing, it is "I submit that it will be necessary to take an account of the debt contracted and due by the said firm of *Moffatt, Bros. & Co.*, (composed of the mortgagors) as it existed on the said 31st day of December, 1873, and of any renewals, alterations or substitutions," and the answer goes on to express a belief that upon taking of such account a very small portion thereof will be found due.

Judgment.

Mr. *Boulton* claims on behalf of the Bank that there is no question now open, between the Bank and the insolvent estate as to the value of the security that the value placed upon it by the Bank not having been objected to has become binding upon the general body of creditors. The evidence is not very definite as to the dates of the valuation of the security and of subsequent meetings of creditors and as to what has been done at any meeting or meetings of creditors in respect to the value put upon the security by the Ba k. From some of the answers given by the assignee I should understand that the value placed upon the security by the Bank had been acquiesced in; from others, that the whole was still in abeyance: and it appears to have been treated as if depending, to some extent at least, on

the amount that may be realized from customers' paper; though, I confess, I am unable to see what the one has to do with the other. [His Lordship here read evidence of defendant *Kerr*.]

But there is this difficulty: Upon the face of the mortgage certain properties were mortgaged to the Bank. Any properties of the insolvents or either of them outside the mortgage would belong to the estate. The Bank has established an equity to have certain parcels of land, which not being in terms included in the mortgage would *primâ facie* belong to the general body of creditors, included in the mortgage. It does notappear, by anything that is before me, whether the value placed upon the security was made upon the assumption that the written document comprised all the land that was intended to be comprised in it, or only that which was in terms comprised in it. The assignee and the creditors would naturally conclude that the latter was the case; and it is not shewn that it was made known to them, that the Bank claimed to be entitled to have their mortgage reformed so as to have these other parcels of land included in it. How much the value of the mortgage as a security would be enhanced, and is, in fact, now enhanced by having these parcels included in it, beyond what may be termed its face value *i.e.*, without those parcels forming part of the security, does not appear, but I apprehend there must be a substantial difference, otherwise the trouble and expense of adding them would not have been incurred, and I should come to the same conclusion from the description of the parcels themselves.

Judgment.

What the difference in value may be is, indeed, not material, for it is out of the question to bind the general body of creditors by a supposed acquiescence in a value placed upon the mortgage security under these circumstances. It may be that they would acquiesce looking at

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what I have termed the face value of the mortgage ; and would refuse to acquiesce under the altered circumstance of other parcels of land being to be included—and it is only just that they should now—after the Bank have established their title to have these additional parcels of land included in their mortgage, have the election given to them by the statute, the Bank adhering to the value already placed upon their security ; or, if they think fit placing a new value upon it, and the assignee and creditors thereupon taking such course in regard to it as is proper under the statute.

The Bill may be retained, and parties will, of course, have liberty to apply. For the present the parties must be remitted back to their proceedings in Insolvency, the same or another value to be placed by the Bank upon their security, and the assignee and creditors proceeding under the statute. If these proceedings should result in the mortgage security being retained by the Bank, then proceedings may be resumed by the Bank in this Court for realizing the security. A petiton stating shortly the proceedings taken and their result will be the proper course.

Judgment.

In the event of the mortgage security being left to be taken by the Bank, it would be an unmeaning form to give a time to redeem to the assignee ; but the mortgagor, other than the insolvents, has a right to redeem if any of the mortgage property was his, or if the Bank press for an order for payment against him.

I think neither party should have costs. Not the Bank for the insolvent estate ought not to pay the costs of correcting the mistake, which was theirs as well as the mortgagors' ; and not the assignee as against the Bank, for he fails in the objections taken by him on behalf of the estate to the plaintiffs' bill. The costs against the mortgagors other than the insolvents should be only those of an ordinary undefended suit for foreclosure or sale.

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West Gwillimbury v. Hamilton & North Western Railway Company.

Pleading—Parties—Demurrer.

The county of Simcoe had under a by-law, passed in pursuance of 35 Vic., ch. 66, sec. 15, issued debentures to the amount of $300,000 to aid in the construction of the Hamilton and North Western Railway (See Ante vol. xx., p. 211), but by reason of the neglect of the company to commence the construction of the railway within the time limited, their charter had become forfeited, and the by-law under which the debentures had been issued had therefore become void and of no effect, whereupon one of the townships which had joined in the petition for the passing of the by-law, filed a bill against the railway, the county and trustees of the debentures, seeking to restrain the trustees from selling or parting with the debentures and to have the same handed back to the County.

Held, on demurrer by the County (1.) That the township had not any interest to maintain such a suit, and (2.) that the corporation of the County was the proper party to institute proceedings.

Statement.

This bill was filed by *The Township of West Gwillimbury* against *The Hamilton and North Western Railway Company*, *J. M. Williams*, *E. Gurney*, *W. Boys*, and *The Corporation of the County of Simcoe*, and stated that by the 4th section of the Company's Act, 35 Vic., ch. 66, the capital of the company was fixed at the sum of $600,000, to be divided into 6,000 shares of $100 each. That by the 7th section, as soon as shares to the amount of $200,000, in the capital stock of the company should be subscribed, 10 per cent. paid into one of the chartered banks, &c., or when and so soon as such subscription, together with sums granted by municipalities, either by way of bonus or in subscription to the capital stock, should amount to such sum of $200,000 and the debentures granted in payment of such bonus or subscription should have been deposited in one of the chartered banks, &c., or with the Provincial Treasurer in the name of trustees as provided in the Act, the provisional directors were empowered to call a general

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meeting for the election of directors. By the 15th section, in case, at least, fifty of the persons rated on the last assessment roll as freeholders who may be qualified voters under the Municipal Act in any portion of a municipality do petition the council of such municipality to pass a by-law as thereinafter mentioned, and in such petition do define the metes and bounds, or the section of the municipality within which the property of the petitioners is situated, or in the case of a county municipality of fifty persons at the least, of the qualified ratepayers within the portion of the county affected, or the majority of the reeves and deputy-reeves for those townships, towns, or incorporated villages that may be asked to grant a bonus do petition the council of such county municipality to pass a by-law as thereinafter set out, and in such petition do define the townships, towns, or incorporated villages for which they are respectively the reeves and deputy-reeves, expressing the desire of the petitioners to aid in the construction of the railway, by granting a bonus to the company for this purpose, and stating the amount, which they desire to grant and to be assessed for; and in such petition do define the municipalities or portions of municipalities that may be asked to grant such aid, the council of such municipality or county municipality, as the case may be, shall pass a by-law and submit the same to the vote of the qualified ratepayers of the municipality or municipalities defined in said petition: 1. For raising the amount petitioned for in such portion of the municipality by the issue of debentures of the municipality, payable in twenty years or earlier; or by annual instalments, and for the delivery to trustees of the debentures for the amount of the bonus, at the times and on the terms specified in the said petition. 2. For assessing and levying upon all the ratable property lying within the section defined by the petition an annual special rate sufficient to include a sinking fund for the repayment of the debentures with interest.

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That in pursuance of that section a petition was presented to the County Council of the County of Simcoe by certain ratepayers within portions of the county, and amongst others of the municipality of the township of West Gwillimbury, which under the powers for grouping was included with others in the by-law, expressing a desire to aid in the construction of the railway, by granting a bonus of $300,000 to the railway, and in pursuance of the petition a by-law was submitted by the County Council to the votes of the ratepayers of the municipalities included in the petition, viz., West Gwillimbury, Tecumseth, Adjala, Mulmur, Tosorontio, Essa, Vespra, Sunnidale, Nottawasaga, Town of Barrie, and Town of Collingwood, for that purpose. That the vote was taken on the 30th May, 1873, and the by-law carried, and it was subsequently ratified and passed by the County Council and the debentures thereunder issued and deliverd to the three individual defendants, who were chosen trustees for that purpose as provided by the Act, and were still in their hands for the purpose of the by-law, and subject to the terms and conditions named, viz., to aid in the construction of the railway. By the 36 Vic. ch. 84, the time for the commencement of the railway was extended to two years from the 29th March, 1873. That the Company had not complied with the provisions of their charter as regarded the subscription of stock and payment of deposits and calls thereon and the election of regular directors, and had not commenced the construction of the railway within the time limited,—and by reason of such neglect the charter was forfeited (36 Vic. ch. 84 sec. 6), and the by-law had therefore become void and of no effect. That the trustees held the debentures placed in their hands subject to the trusts contained in the said by-law and for no other purpose; and that the charter having become forfeited the debentures should be returned to the Corporation of Simcoe, or in the case of the sale thereof the proceeds should be paid over to the Corporation of Simcoe.

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That *The Hamilton and North Western Railway Co.* still assumed to call themselves and to act as a body corporate under their charter, and claimed that they were entitled to the debentures in the hands of the trustees and that the trustees intended to make a sale of them, and hand over the proceeds to the Railway Company.

The bill prayed an injunction to restrain the trustees from selling or parting with the debentures. That the by-law might be declared void, and the debentures issued under it handed back to the Corporation of Simcoe.

The County of Simcoe demurred to the bill for want of equity; and for want of parties, inasmuch as the other municipalities grouped with the plaintiffs were not parties to the suit.

Argument.

Mr. *McCarthy*, Q. C. The Corporation of the County of Simcoe is the proper party to interfere in this matter, and there is nothing stated in the bill to shew that the County has not already done so or is not now taking active steps to obtain the relief prayed for in this suit; but however this may be, clearly the plaintiffs have not any right to interfere: *Gardiner* v. *McDougall* (*a*), *McMurray* v. *Northern Railway Co.* (*b*), are clear authorities on this point. A ratepayer can appeal to this Court against a by-law which he considers to be *ultra vires*, but he cannot take such a step as this, which can be properly taken by the Corporation of the County alone, and no more can such a proceeding be taken by any of the village or township corporations.

Mr. *D. G. Boulton*, contra. *McMurray* v. *The Northern Railway Co.*, does not apply here: *Russell* v. *The Wakefield Water Works* (*c*). A shareholder in a trading corporation cannot take such a step unless he shews that he has called upon the corporation to do so,

(*a*) L. R. 1 Ch. D. 14. (*b*) 22 Gr. 476, and 23 Gr. 134.
(*c*) 44 L. J. Ch. 496.

and that they have refused or states that it would be useless for him to call upon the corporate body to do so. 1876.

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In *Brogdin The* v. *Bank of Upper Canada* (*a*) it was held not necessary to make an application to the corporation to take proceedings. In this class of cases the Court will not be so strict in the application of the rule as in the case of trading corporations, *West Gwillimbury* v. *Simcoe* (*b*); there the bill was filed to get rid of the by-law altogether. Here the only relief asked is, the by-law having become void, that the debentures may be delivered up.

Mr. *McCarthy*, Q. C., in reply. There is no question that the by-law is bad, or at least, has become void, but granting that, there is not any reason shewn by the present plaintiffs why the county should not be allowed to manage their own affairs. *Paterson* v. *Bowes (c)* shews that a reason existed in that case, as the seal of the corporation upon being applied for could not be obtained. Here it is not alleged that the county are doing anything improper, or that they intend acting in an illegal manner; and it is not stated that the corporation have been asked to take proceedings, and have refused to do so: clearly the contracting parties are the proper parties to sue. In *West Gwillimbury* v. *Simcoe* both parties were desirous of having the case disposed of on the merits, and therefore the point as to the right of the plaintiffs to maintain that suit was not raised.

PROUDFOOT, V. C. [After stating the facts as above.] I think the demurrer on the first ground must be allowed—for two reasons,—because the plaintiffs have no interest to maintain the suit,—and because the Corporation of Simcoe is the proper plaintiff. Judgment.

The plaintiffs in their collective capacity are not con-

(*a*) 13 Gr. 544. (*b*) 20 Gr. 211. (*c*) 4 Gr. 170.

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stituents of the Count of Simcoe; they are not ratepayers, although the individuals whom they represent are; their property as a corporation is not assessed; the inhabitants of the Township of West Gwillimbury are assessed not in that capacity but as residents of the County of Simcoe. The officers of the townships are, indeed, made use of as instruments to assess and levy the rate, but the debt is the debt of the County; the debentures are the obligations of the County, and it is the property of the County, and the rates levied by the County that have to pay the debt. All these considerations would have applied equally in the case of *West Gwillimbury* v. *Simcoe* (*a*), but the question is not noticed in the judgment, although I have ascertained that it was argued. I assume, therefore, that Mr. *McCarthy's* statement was accurate that the opinion of the Court was not desired on that point, as all parties were anxious to have a decision on the main subject—the validity of the by-law. Of course, had my brother *Blake* determined that the plaintiffs might sue in that case I would have felt bound to follow the decision, and give them alike *locus standi* here.

Judgment

But upon the second ground I apprehend the plaintiffs cannot maintain this suit, the proper plaintiffs being the County of Simcoe. In the bill there is no charge of any illegal or improper acts on the part of the County; all that is stated is, that in compliance with the requisition of the persons entitled by the statute to make it, they submitted the by-law to the ratepayers, and, after it was approved by them, passed and confirmed it as a by-law of the County. The validity of the by-law was established in the case quoted. The debentures issued in pursuance of it have been signed and delivered to the trustees. The subsequent events which are alleged in the bill as having terminated the incorporation of the Railway Company, are not stated to

(*a*) 20 Gr. 211.

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have been brought to the knowledge of the County; nor is the County alleged to have refused to take action upon them, nor to call for the surrender of the debentures. It is the province of the County itself, if the allegations in the bill are true, to call for the redelivery of the debentures; and unless the County refuse to exercise this function no one else has a right to interfere.

The cases on this question are numerous, but the current of authority from *Foss* v. *Harbottle* (*a*), downwards is uniform that such a suit, in the absence of special circumstances, which are not stated here, must be brought by the corporation itself. In *Russell* v. *Wakefield Water Works Co.* (*b*), the doctrine was fully recognized and acted on by the Master of the Rolls. There a shareholder, in an incorporated company, filed a bill on behalf of himself and all other shareholders, against the directors and the promoters of a bill in Parliament for a rival purpose, alleging an illegal payment, by the directors, of the company's money to the promoters to buy off their opposition, and praying that it might be replaced; but the bill contained no sufficient allegation that the company would not sue, and it was held the bill could not be maintained: *Gray* v. *Lewis* (*c*), and *Macdougall* v. *Gardiner* (*d*), are decisions to the same effect. And in our own Court the question has recently been considered by the Court in *McMurray* v. *The Northern Railway Co.* (*e*), and the same conclusion arrived at.

Judgment.

It was attempted to distinguish these cases from the present on the ground that they referred to past transactions, while here the plaintiffs sought to compel the county to perform a duty in the future—to recall the

(*a*) 2 Hare 461. (*b*) L. R. 20 Eq. 474.
(*c*) L. R. 8 Chy. at 1049, 1055. (*d*) L. R. 1 Ch. D. 13.
(*e*) 22 Gr. 476 and ante page 134.

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There is, no doubt, a difference between trading and municipal corporations, and it may be easier to ascertain the intentions of the former, than of the latter. But this does not seem a sufficient ground for applying different rules of action to them. In each case the corporation is the person who must sue, and individual members have no right to institute proceedings, until the corporate body has refused to act for the benefit of its members.

Judgment.

The demurrer is allowed, and leave given to amend.

Grey v. Ball.

Registered title—Notice—Possession.

The plaintiff's brother bought certain lands for her, and put her in possession thereof, but afterwards obtained the patent therefor in his own name and procured incumbrances to be created thereon, which were duly registered.

Held, that the equitable interest of the plaintiff could not prevail against the title of the incumbrancers, possession not being such notice of title as will affect the right of a party claiming under a registered conveyance.

Bell v. *Walker*, *ante* vol. xx., page 569, approved of.

Section 66 of the Registry Act of 1865, and section 68 of the Registry Act of 1868, considered and ruled upon.

The bill was filed by the plaintiff claiming to be the equitable owner of certain lands under a purchase made for her by her brother, the Rev. *George C. Moore*, in 1858. The patent issued in his name in 1861, while she was in possession, and in 1864 *George C. Moore*, without notice

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to the plaintiff conveyed the land to his brother *Thomas L. Moore*, for the nominal consideration of $2,500. No money passed, but *Thomas L. Moore*, who never went into or demanded possession, thereupon executed a mortgage to the defendant *Adam T. H. Ball* for $1000 with interest at 12 per cent.; and another to his brother *George C. Moore* for $1500 with interest at 10 per cent. *Thomas L. Moore* paid nothing on either mortgage; and in 1873 *Ball* ejected the plaintiff from the lands. She thereupon filed her bill, setting up her possession and equitable title. The defendant *Ball*, claimed the land under his mortgage, and also claimed the protection of the registry laws "then in force in this province." During the argument the Chancellor allowed the defendant to file a supplemental answer, claiming the protection of the registry laws generally. Evidence was adduced on the part of the plaintiff in support of the allegations of the bill. The defendants called no witnesses.

Argument.

Mr. *Hodgins*, Q. C., for the plaintiff. The Registry Acts do not alter the common law as to possession. By the common law, possession was *primâ facie* evidence of a seizin in fee, and was the elder claim of title. The paper title is the creature of legislation and the registry laws only affect such titles, and there is nothing in them to repeal the common law rules as to the possessory title. The section of the Acts of 1865 (sec. 66) and of 1868 (sec. 68) came into operation on the passing of those Acts, and could not affect titles then completed by possession, and respecting which no paper title could be registered. If the section operates as the defendants contend, it would cut out a title of a dowress in actual possession, of her equitable dower, by the execution and registration of a deed from the heir. A purchaser is bound to search the registry office as to registration; and the sheriff's office as to *fi. fas.* against lands, and is bound to inquire as to dower, and he should also

1876. Grey v. Ball. inquire as to possession. Under the registry laws when the plaintiff's title accrued, leases for twenty-one years, and under the present Registry Act leases for seven years, where the actual possession goeth with the lease, are not required to be registered. *Moore* v. *Bank of British North America* (*a*), *Gray* v. *Coucher* (*b*), apply to this case although the defendants may rely upon *Bell* v. *Walker* (*c*). In the latter case the judgment appears to go in part on the assumption that the Act of 1865, although passed on the 18th September, did not come into force until the 1st January following, but by examining the sections 1, 9, 37, 38, 43, 52, 61, 66, 68, sub-section 8 and section 78, it would appear that the new provisions of which the section governing this case was one, came into operation immediately, and that the old provisions were retained until the 1st January.

Mr. *Boyd*, for the defendant *Ball*. The plaintiff's title is based upon very shadowy evidence and the defendant *Ball*, has not called witnesses, relying upon the defence of the registry laws. The law as laid down in the cases of *Sherboneau* v. *Jeffs* (*d*) and *Bell* v. *Walker*, is clearly in favour of the defendant, and the latter being a decision of the full Court, cannot be reversed on this hearing.

Mr. *Cross* for the other defendants.

May 25th. Judgment. SPRAGGE, C. At the close of the argument it was agreed by counsel that if the defendant *Ball* can hold his registered mortgage against the equity set up by the plaintiff, assuming that equity to be established, there is practically an end to the case, *Ball's* mortgage debt and interest being equal to the full value of the property in question.

(*a*) 15 Gr. 308. (*b*) 15 Gr. 419.
(*c*) 20 Gr. 558. (*d*) 15 Gr. 574.

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The question arises under the provision contained in sec. 66 of the Registry Act of 1865, and which is re-enacted in the same terms in sec. 68 of the Registry Act of 1868. It is as follows: "No equitable lien, charge, or interest affecting land shall be deemed valid in any Court in this Province after this Act shall come into operation as against a registered instrument executed by the same party his heirs or assigns."

Mr. *Hodgins's* contention is, that my brother *Blake* was in error in holding in *Bell* v. *Walker* (*a*) that the Act of 1865, passed on the 18th of September in that year, did not come into force until the 1st of January, 1866, thus giving the interval for the assertion by parties interested, of the equities dealt with by sec. 66. The coming into operation of some of the provisions was certainly postponed to the later of these dates. Whether the coming into force of sec. 66 was so postponed or whether it came into force immediately, appears to me to be immaterial to the question before me. If postponed, time was given for asserting these equitics; if not postponed time was not given, and they were extinguished summarily upon the passing of the Act on the 18th September.

Judgment.

Then the same provision is re-enacted in the Registry Act of 1868; and certainly in this latter Act, no further time is given for the assertion of these equities in any Court in this Province.

Mr. *Hodgins* contends that possession is notice, and that without notice of possession, against a registered title, and he points out some inconvenient results that he conceives to follow, if it were held otherwise: but it has been already held in this Court that possession *per se* is not notice to affect a registered title; and I apprehend it would not be that "actual notice" required

(*a*) 20 Gr. 558.

1876. Grey v. Ball.

by each of these Acts in order to affect priority of registration, as against a prior instrument: what is required in such a case is, "actual notice of the prior instrument." It would be an anomaly, looking at the way in which equitable interests are dealt with by these Acts to hold possession by the person having such interest *per se* notice against a registered title, when possession by a person having a "prior instrument" would not be notice.

Mr. *Hodgins* has contended that these Acts do not apply to equities existing prior to their being passed. I entirely agree with the observations of my brother *Blake* upon that point in *Bell* v. *Walker*.

I have, I confess, not been able to satisfy myself as to the intention of the Legislature in the use of the words in the sections quoted, "executed by the same party, his heirs, or assigns." The primary meaning of these words would be, "executed by the party who has the equitable lien, charge, or interest;" and the clause would read, that no equitable lien, charge, or interest shall be deemed valid in any Court as against a registered instrument executed by the party having such equitable interest. But what as to registered instruments executed by others than those having such equitable interests—are they to continue to be valid as against them? It is in comparatively few cases that the party having the equitable interest, and the party executing the registered instrument are the same, and where they are the same, the aid of this provision in the Statute would not be needed. It is impossible, I think, that the Legislature could have intended to confine the operation of this salutary provision to such cases; because if so confined, it would practically be a dead letter and would disappoint the obvious intention of the Legislature. The point was not raised in this case, nor in *Bell* v. *Walker*, nor, so far as I am aware, in any of the cases that have

Judgment.

been before the Court, and if it had been raised in this case I should have held it not tenable, for though the words are there I think I ought to give effect to the Act according to what appears to be its intent, viz., to make it safe for purchasers of land to deal in the matter of title as far as practicable upon what appears in the Registry office. The bill must be dismissed. The defendants *Ball* and *Findlay* to have their costs. No costs for or against the other defendants.

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ALLAN. v. GEORGE B. PHELPS AND JOHN L. PHELPS.

Railway stock—Charging order—Fraud—Practice.

A charging order was made against stock in a railway company to which a party was entitled, but such stock it was shewn had, by his direction been issued to his son, so that in a suit against the father the sheriff could not dispose of it under execution. Whereupon a bill was filed against the father and son stating these facts, and charging that the son gave no consideration for the stock; that the same was issued to him to hold for the use of the father, and was so issued to defeat, hinder, and delay the plaintiffs and other creditors of the father. At the hearing no evidence was given in support of the plaintiffs' case other than the pleadings and proceedings in the suit against the father and in which such charging order had been made; but the depositions of the son, who had been examined in that suit, were not read.

Held, that has the son had not been a party to that cause he was not bound by the evidence therein, the Court, therefore, refused to make any decree against him, and as any decree against the father would not give the plaintiffs any greater benefit than they had by the charging order, dismissed the bill with costs.

This was a bill for equitable execution, under the following circumstances: Statement.

The plaintiffs in a suit of *Caffrey* v. *George Phelps* and *D. Warren*, obtained a decree on the 24th of November, 1875, referring it to the Master at Kingston to take an account of the amount due by the defendants to the plaintiffs, for work done under the agreements as

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alleged in the 11th paragraph of the bill; and also an account of the amount due by the defendants to the plaintiffs for the loss of profits and other damages which the plaintiffs had sustained by reason of the breach of the said contract by the defendants.

On the 17th of December, 1875, the Master reported due to the plaintiffs for work done under the agreements.....$ 426.93
And for loss of profits and damages..... 3,977.15

$4,404.08
And he taxed to the plaintiffs their costs at... 168.12

$4,572.20

Statement.

On the 18th of December, a writ of execution was ssued, upon that decree and report, against the goods and chattels of the defendants, and placed in the hands of the sheriff of Frontenac, with directions to seize all the stock held by the defendants in the Kingston and Pembroke Railway Company, and the sheriff served the proper notices on the offices of the company, stating that he had seized the stock by virtue of the execution.

It was found, however, that no stock had issued to *G. B. Phelps & Co.*, but that by the order of *G. B. Phelps* $4,500 of stock, to which *G. B. Phelps & Co.* were entitled, was issued by the railway company on the 22nd of October, 1875, to *John L. Phelps*, so that the sheriff was unable to dispose of it.

On the 18th of January, 1876, the present bill was filed against *George. B. Phelps* and *John L. Phelps*, stating the foregoing facts, and charging that *John L. Phelps* gave no consideration for the stock; that he is a son of the other defendant, and that the stock was issued to him to hold for the use and benefit of *George B. Phelps*, and was so issued with the intent to defeat,

delay and hinder the plaintiffs and other creditors of *George B. Phelps*, in the recovery of their claims. 1876. Allan v. Phelps.

The bill prayed that the execution of the judgment might be aided, and the stock sold.

The defendants answered and the case came on for hearing at the last sittings for Kingston (30th May, 1876).

In support of the plaintiffs' case they put in the decree and report in *Caffrey* v. *Phelps*—the *fi. fa.*—and a petition for a charging order, the order *nisi*, and the order absolute, charging the $4,500 stock standing in *John L. Phelps's* name, with the amount found due by the report $4,572.20 with interest from 17th December, 1875.

The petition for the charging order was filed in the suit of *Caffrey* v. *Phelps*, on the 11th January, 1876; the order *nisi* therein was obtained the same day, and the order absolute on the 25th of April, 1876. Statement.

No evidence was offered on behalf of the defendants.

It appeared that the order absolute was made upon hearing read evidence taken before the Master at Kingston, and the examination of *George B. Phelps* and *John L. Phelps* taken at Watertown, New York, under commission.

Mr. *G. M. McDonald*, for plaintiffs.

Mr. *Price* and Mr. *Walkem*, for defendants.

PROUDFOOT, V. C. [After stating the facts as above, continued.] I apprehend that none of the proceedings in *Caffrey* v. *Phelps* are evidence against *John L. Phelps*, who was not a party to the suit. He was, July 8th. Judgment

1876. Allan v. Phelps.

indeed, examined as a witness on the proceedings under the petition, but that would not make the order binding on him. The order absolute declared in effect that *George B. Phelps* was the beneficial owner of the stock, but that could not be enforced against *John L. Phelps*. The order was *res inter alios actæ* (*a*); and upon the same principle the evidence taken under the petition could not be read against him. His own depositions might, perhaps, have been used if they contained admissions, but they were not offered, and I have not read them.

The plaintiffs' case was argued as if it was for the purpose of giving effect to the charging order, but that is not so, for the order was not obtained till some months after filing the bill, and no proceedings could be taken upon it till six months after the date of the order, a time which has not yet elapsed (*b*). And even had it been for that purpose, I consider evidence would have had to be given to affect *John L. Phelps* with a fraud in obtaining and holding the stock. The order is, I presume, conclusive as to *George B. Phelps*, but seems to me not to prove anything against *John L. Phelps*.

Judgment.

As no decree can be made against the defendant, in whose name the stock stands, any decree against the other would give the plaintiffs no greater benefit than they have by the charging order.

The bill is dismissed with costs.

(*a*) *Daniel* C. P., 5th ed., 763; *Taylor* on Evidence, sec. 1495 et seq.

(*b*) *Dan.* Pr., 5th ed., 899.

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Re O'Donohoe—In the Matter of Lot 1 in the 7th Concession of the Township of Elderslie.

Quieting Titles Act—Statute of Frauds—Trustees and cestui que trust.

In December, 1856, the Crown granted to *D.* three lots (1, 2, and 3,) in fee simple. It was shewn, however, that he held the same in trust for the joint benefit of himself and two partners, *J. M.* and *G. J.* In October, 1857, *G. J.* for an alleged consideration of £1,500 assigned all his right and title to the undivided one-third of such lands to the Bank of Upper Canada, but in reality only as security for a debt due by him to the bank. In February, 1858, *G. J.* having become involved made an assignment of all his interest in the same lands to *D. McI.* and *J. D. M.* upon trust (1) to pay costs of assignment and execution of trust, (2) to pay the trustees certain claims, (3) to pay such of the creditors of *G. J.* (other than the said bank) who should execute the deed, within thirty days after notice thereof should be mailed to them, *pari passu*, and (4) to pay the surplus, if any, to *G. J.*, several of whose creditors joined in the conveyance. In a suit brought by the bank a decree was obtained foreclosing the interest of *G. J.* and the trustees. In October, 1858, *D.* and *J. M.*, in order to save their estate for the benefit of their creditors generally, made an assignment of all their property, real and personal, including the lands in question to one *Maulson* in trust, amongst other things, to sell and apply the proceeds (1) in payment of expenses of assignment and carrying trusts into execution; (2) to retain a reasonable compensation for his own trouble; (3) to pay the registered judgment creditors of *D.* and *J. M.* according to their priorities; (4) to pay all other creditors who should execute the assignment within two months after request in writing so to do, and who were required to accept such dividend as the residue of the estate would yield in satisfaction of their debts; (5) to pay any surplus to *D.* and *J. M.*, which instrument was duly executed by the assignors, the assignee and three creditors; but the trustee being unable to carry out the trusts, retained the title in himself. In October, 1858, and June, 1859, judgments were recovered in actions in which, with others, *D.*, *G. J.* and *J. M.* were defendants. In December, 1866, *G. J.* died. In February, 1867, and May, 1868, executions against lands were issued under which the sheriff sold, and the petitioner became the purchaser of the three lots for $1,625 (about one-fourth their value); as to two of these lots, however, the sale was avoided in this Court (*ante* vol. xix. p. 95). Thereupon, and in August, 1874, the petitioner obtained from *Maulson* a conveyance of the legal estate vested in him as trustee of the land in question (lot one), for a nominal consideration.

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Re O'Donohoe.

Held, in a proceding under the Act for Quieting Titles, (1) that the assignments in trust of February, 1858, and October, 1858, were not void as fraudulent preferences under the 19th section of the Statute 22 Victoria ch 96 (Con. Stat. U. C. ch. 26, sec. 18), and (2) that the trust in favour of the assignors was not such a trust as enabled the sheriff to sell under the 10th section of the Statute of Frauds: to enable him to do so the trust must be a clear and simple one for the benefit of the debtor.

This was an appeal by the petitioner, *Kate O'Donohoe*, from the ruling of the late Referee (*Holmested*), who in dismissing the petition stated that "The petitioner's title in this matter is derived under a sheriff's sale under executions issued in two suits of *O'Neil* v. *Jardine et al.*, and *O'Donohoe* v. *Jardine et al.* In *O'Neil* v. *Jardine*, the judgment was recovered on the 28th October, 1858, in the Common Pleas against *George Jardine*, *John McNab*, *Thomas Hembroff*, *John Drysdale*, and *John O'Donohoe*, for £195 8s. 2d. *Fi. fa.* goods issued on the 25th January, 1867, returned by the sheriff *nulla bona*, and on the 18th February, 1867, a *fi. fa.* lands issued to the sheriff of Bruce, which was afterwards returned lands on hand, and a *ven. ex.* appears to have issued on the 4th May, 1868, according to the recital in the sheriff's deed, under which the sale in question took place. In *O'Donohoe* v. *Jardine* the judgment was recovered on the 29th June, 1859, in the Queen's Bench, against *George Jardine*, *John M. McNab*, *John Drysdale*, and *Thomas Hembroff*, for £187 17s 8d, and a *fi. fa.* lands appears to have issued to the sheriff of Bruce on the 15th February, 1867, which was afterwards returned lands on hand, and according to the recitals in the sheriff's deed a *ven. ex.* issued to the sheriff on the 4th May, 1868, under which the sheriff sold. At the time the *fi. fas.* lands and writs of *ven. ex.* issued, one of the defendants, *George Jardine*, appears to have been dead, he having died somewhere about Christmas, 1866. The lands in question were granted by the Crown to *John Drysdale* in fee, on the 23rd December, 1856, and so far

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as the patent is concerned he appeared to have been grantee for his own sole use and benefit. It now appears by the evidence of the contestant that the lot in question was purchased by the firm of *Jardine, Drysdale & McNab*, of which he was a partner, and for the joint benefit of the partners in equal shares, as a speculation; that at the time of the purchase the contestant was a minor, and *Jardine* was in trade, and it was therefore, considered safer that the patent should be taken in the name of *Drysdale* alone. On the 3rd of October, 1857, *George Jardine*, by deed registered 11th January 1858, purporting to be made in consideration of £1500, assigned 'to the Bank of Upper Canada and their assigns forever,' all his right, title, and interest, both at law and in equity, to the undivided one-third of the unsold portions of lots 1, 2, and 3 in the 7th concession of Elderslie. Subsequently, having become embarrassed, *Jardine*, by deed of assignment dated 25th February, 1858, and registered 5th March, 1858, assigned 'all his right, title, and interest both at law and in equity to the property bought by him on joint account with *John McNab* and *John Drysdale*, and known as the Lockerby Property, and being lots 1, 2, and 3, in the 7th concession of Elderslie,' &c., to *Donald McInnes & James D. Mackay*, upon trust to pay, in the first place, costs of assignment and execution of trusts. 2nd, to pay *Donald McInnes & Co.*, what they might have to pay in respect of a draft of *Jardine's* for £250, accepted by them and supposed to be held by the Bank of Upper Canada, and also two accommodation notes for £62 10s. each, made by *Burton, Sadlier & Bruce* and all other accommodation paper of the said *Burton, Sadlier & Bruce* which they might be called on to pay. 3rd, to pay such of the creditors of *Jardine* (except the Bank of Upper Canada), who should execute the deed within thirty days after notice thereof should be mailed to them, *pari passu*. 4th, to pay surplus, if any, to the said *Jardine*. Several creditors became parties to this

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assignment. There is no evidence adduced as to the circumstances under which the deed to the Bank of Upper Canada was executed, nor of any reconveyance by the bank, nor is there anything to shew why *Jardine*, having apparently assigned all his interest absolutely to the Bank of Upper Canada, subsequently assigned it again to *McInnes & Mackay*. From the answer of the trustees of the Bank of Upper Canada, in the suit of *O'Donohoe* v. *Hembroff*, it would seem that the deed, although absolute in form was really taken merely as a security for a debt due by *Jardine* to the bank, and from this answer it would also appear that proceedings were taken by the bank in this Court against *Jardine* and *McInnes & Mackay*, and a decree foreclosing their equity of redemption obtained. * * * Both the Minister of Justice, as representing the Bank of Upper Canada, and *Donald McInnes*, the surviving trustee, have been served with notice in this matter, but neither of them has preferred any claim.

Judgment.

On the 9th October, 1858, *Drysdale* and *McNab*, being pressed for payment of notes which had been given for lots 2 and 3, and as Mr. *McNab* states, and as Mr. *Drysdale's* letters which have been put in also shew, with a view of preventing the Lockerby Property being sacrificed by one creditor at the expense of the rest made an assignment of all their property, including the lot in question, to *John Maulson* for the benefit of creditors, upon trust to make conveyances of certain portions of the lot which had been sold to the several purchasers thereof, upon payment of their purchase money—some of the lots affected by this trust form part of the land now in question—and, 2nd, in trust to sell and apply the proceeds. 1st, in payment of expenses of assignment and carrying trusts into execution. 2nd, to retain a reasonable per centage for his own trouble. 3rd, to pay the registered judgment creditors of *Drysdale* and *McNab*, according to their priorities.

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4th, to pay all other creditors who should execute the assignment within two months after a request in writing so to do—and who were required to accept such dividend as the residue of the estate would yield, in satisfaction of their debts—5th, to pay any surplus to *Drysdale* and *McNab*. This assignment was executed by the assignors and the assignee and by three creditors. It was registered on the 13th October, 1858, and according to Mr. *Maulson's* evidence he attempted to sell the property under it, and finding it impossible to get the concurrence of certain creditors at Hamilton he gave up all attempt to carry out the trusts. On the 12th of December, 1868, the sale under the executions in *O'Neil* v. *Jardine* and *O'Donohoe* v. *Jardine* took place, and the petitioner became the purchaser of the three lots—1, 2, and 3—for the sum of $1,625. The three lots at that time being worth * * * from $1,500 to $2,000 each, or about $6,000 for the three. * * * As to lots 2 and 3 the sale was afterwards in effect avoided in the suit of *O'Donohoe* v. *Hembroff (a)*, *Hembroff* in that suit claiming to have been the vendor of lots 2 and 3 to *Jardine*, *Drysdale & McNab*, and as such entitled to a lien on those two lots for unpaid purchase money, paramount to the plaintiff's claim under the sheriff's sale. This contention was sustained by the decree of the Court and lots 2 and 3 were resold in that suit. No question of that kind appears to exist with regard to the land now in question. In order to better the title of the petitioner it appears that he had, in August, 1874, procured from *John Maulson*, a deed conveying the legal estate in the lands for the sum of $50."

Statement.

Mr. *Leith*, for the petitioner, contended that the assignment of *Jardine* to the bank was void in face of the charter of the bank, there being no power given in

Nov. 1, 1875.

(a) 19 Gr. 95.

1876. the charter for the bank to take a conveyance of real estate as security.

Re O'Donohoe.

That the assignment by *Jardine* to *McInnes* and *McNab* was void as being a preferential assignment.

The assignment by *Drysdale & McNab* to *Maulson* was also void under 22 Victoria, being subsequent to that Act, and also as being clearly preferential. That instrument, requiring creditors to come in within two months after specific notice, and containing provisions for continuing the business; and the surplus is not to go to the unpaid creditors, but to the grantors. See *Bank of Toronto* v. *Eccles* (*b*). Creditors executing the instrument in effect become partners. See also cases referred to in *Bank of Toronto* v. *Eccles*. This was an unreasonable condition, and consequently void, any damage to creditors being made parties being sufficient to avoid the instrument.

Argument.

The head note to *Metcalf* v. *Keefer* (*a*), is wrong. The time limited for creditors to come in after notice mailed in Hamilton Post office was also an unreasonable condition ; and it is to be remarked that the judgment in *The Bank of Toronto* v. *Eccles* was dissented from by the Vice Chancellors.

The deed by *Drysdale & McNab* to *Maulson* was made subsequent to 22 Victoria, and was an assignment of personalty as well as realty and it also gives a preference to registered judgment creditors. The deed created a mixed fund, the bulk being personalty. The time limited for creditors to come in, and the provision for accepting a dividend in full, and for the surplus to go to the grantors and not to the creditors not coming in, are unreasonable, preferential, and improper conditions.

(*a*) 2 E. & A. 53.

Burritt v. *Robertson* (*a*), *Watts* v. *Howell* (*b*), *Darling* v. *McIntyre* (*c*), *Cornwall* v. *Gault* (*d*).

Counsel also contended that the above cases applied to the two conveyances by *Jardine*, as well as to the conveyance by *Drysdale & McNab*. On the point of the application of the Statute 22 Victoria to lands as well as goods, the following cases were cited: *Metcalf* v. *Keefer* (*e*), *Newton* v. *Ontario Bank (f)*, *Pegg* v. *Eastman (g)*. But here it was not material whether the Statute (22 Victoria) applies to lands or not, as the conveyance to *Maulson* is of both goods and lands, the bulk being goods, and a large part of the lands had already been converted by contracts of sale. The petitioner is entitled by prior registration of the sheriff's deed to herself under execution against *Jardine*, *Drysdale & McNab*, and others. The contestant here makes no title in himself, but only puts the petitioner to the proof of *her* title on the ground that *Drysdale* was trustee of one-third of the lands in question for him. *McNab* was a party to the conveyance to *Maulson*. The Act of 1865 requires actual notice, and there was no notice to the petitioner who purchased at the sheriff's sale in this case.

Argument.

The purchaser is not even put upon inquiry as to the title of *McNab*, but simply has notice of there being a conveyance by *McNab & Drysdale* to *Maulson*.

Merchant's Bank v. *Morrison* (*h*), *Forrester* v. *Campbell* (*i*), *Wigle* v. *Setterington* (*j*), *Haynes* v. *Gillen (k)*, *McNab* was a stranger to the registry. He was a grantor in the deed by *Drysdale* to *Maulson*. See

(*a*) 18 U. C. R. 555.
(*b*) 21 U. C. R. 255.
(*c*) 19 U. C. R. 154.
(*d*) 23 U. C. R. 46.
(*e*) 8 Gr. 392.
(*f*) 15 Gr. 283.
(*g*) 13 Gr. 137.
(*h*) 18 Gr. 382.
(*i*) 17 Gr. 379.
(*j*) 19 Gr. 512–20.
(*k*) 21 Gr. 15.

1876. section 68 of the Registry Act, which is retroactive, *Bell* v. *Walker* (*a*).

Re O'Donohoe.

Mr. *Ewart,* contra. The principal question raised on this appeal has already been adjudicated upon in *O'Donohoe* v. *Hembroff.* It is true the lands then in question were different from that now in litigation, but all were embraced in the same deeds; the decree in that suit was made on 25th March, 1871. It is also submitted that the actions at law in which *Jardine* was a party having become abated by his death before the issue of the writs of execution, no proceedings thereunder could bind the estate of the defendants in those actions. *Chitty's Archibold,* 12th edition page 1125–6, *Harrison's* Common Law Pro. Act, 408–9.

As to the conveyance by *Maulson* to the petitioner all that need be said in reference to that is, that it was a gross, palpable breach of trust, and could convey no interest to the petitioner except clothed with the same trusts as *Maulson* himself held it.

Mr. *Leith,* in reply. The alleged abatement relied on by the contestant, was at most a mere irregularity, and as such should have been moved against promptly, and the sale at all events was binding on the interests of *Drysdale & McNab.* In any view of the case a suggestion might now be entered on the roll *nunc pro tunc.* Doe *Elmsley* v. *McKenzie* (*b*) *Helm* v. *Crosson* (*c*).

June 21. Judgment.

SPRAGGE, C.—The judgment of the Referee gives a succinct and clear account of the complicated transactions which are brought in question in this matter.

The petitioner was a purchaser, at sheriff's sale under execution, of the lot in question. The question now raised being, "Was there an interest in the execution

(*a*) 29 Gr. 558. (*b*) U. C. R. 559 (*c*) 17 U. C. C. P. 156.

debtors which was saleable under common law process"? The patent was issued in the name of *Drysdale*. He was a trustee for himself, *Jardine* and *McNab*, and if there were nothing more in the case, their interests would, it would seem, be saleable by the sheriff under the 10th section of the Statute of Frauds. 1876. Re O'Donohoe.

It becomes material to consider the conveyances in trust made by these parties, and which are set out in the Referee's judgment, and in reference to some of them the effect of 22 Vic. ch. 96 (Con. Stat. U. C. cap. 26 sec. 18), and which was passed 16th August, 1858.

In the two earlier of these trust deeds *Jardine* was the grantor. [His Lordship here read them as above.] It will be seen that he affects to deal only with his own interest in the land conveyed by him, and they were both, before the passing of the Statute 22 Victoria. Unless therefore they are void under the Statute of Elizabeth, or are saleable under the 10th section of the Statute of Frauds, the lands therein mentioned were not saleable in execution by the sheriff. Judgment

If either of these two conveyances is valid it is sufficient, *e. g.*, if the one to the bank were void, or if, as seems probable, the bank was satisfied otherwise, the conveyance to *McInnes & Mackay* would be valid unless impeachable under the Statute of Elizabeth. I have examined that conveyance and am of opinion that it is not so impeachable. It is another question whether the interest of *Jardine* was saleable under the Statute of Frauds. I will deal with that question when considering the case of *Drysdale & McNab*. There is another reason why the interest of *Jardine* was not saleable, viz., that before the issuing of the writ of execution he had died, and so the suit had, as to him at any rate, become abated.

The next thing in the order of time was the trust

1876. deed for the benefit of creditors, made by *Drysdale & McNab* to *Maulson*. [His Lordship here read that
O'Donohoe. deed as above set forth.] This was after the passing of the Act 22 Victoria. This conveyance does certainly give to some creditors a preference over others; and it is conceded that if sec. 19 applies to real property as well as personalty, that conveyance is void under the Statute.

Three of the cases cited to me were cases where the assignments of chattels only were in question. In a fourth, *Cornwall* v. *Gault* (*a*), the question was not raised, but the Court held the conveyance impeached to have been clearly a device to defeat creditors, and void under the Statute of Elizabeth. In *Metcalf* v. *Keefer* (*b*) again, the question was not raised whether the Statute applied to realty, and the case went off upon another point, and in *Pegg* v. *Eastman* (*c*) the conveyance impeached was held clearly void by the late Chancellor, under the Statute of Elizabeth, as expressed
Judgment. by the Chancellor, "Void both under the Statute of Elizabeth and the Act" (22 Vic.,) he held the conveyance impeached to be "a mere contrivance" to defeat creditors; it was not a case of preferring one creditor to another, and the Act 22 Vic. did not at all come in question.

In *Newton* v. *The Ontario Bank* (*d*) in appeal, the late Vice-Chancellor *Mowat* expressed a strong opinion against the Act applying to real property. He says: "Real estate was certainly not included in the former enactments (and he refers to the Act in question) against preferences by insolvents." The language of the section favors the same construction. It is directed against "any gift, conveyance, assignment, or transfer of any of his goods, chattels, or effects;" and proceeds: "or delivers, or makes over, or causes to be delivered or

(*a*) 23 U. C. 46. (*b*) 8 Gr. 398.
(*c*) 13 Gr. 137. (*d*) 15 Gr. 15.

made over any bills, bonds, notes, or other securities or property." The word "property" is the only word used applicable to real estate and used in the connection that it is, it must, I apprehend, be read as meaning property *ejusdem generis*, and further, the words "deliver or make over," are not the words that would properly be used in relation to a conveyance of real estate. I think the proper conclusion is, that the enactment in question does not apply to real estate. 1876. Re O'Donohoe.

Further, I think it quite clear that the interest of these parties was not saleable by the sheriff under the 10th section of the Statute of Frauds, after the making by them of the trust deeds referred to. This is the language of Lord *Tenterden* in Doe *Hull* v. *Greenhill* (*a*), "We are all of opinion that this case does not present a trust within the intent and meaning of the Statute. The words of the Statute are, 'seized or possessed, in trust for him against whom execution is sued, like as the sheriff might and ought to do, if that person were seized.' This Statute made a change in the common law, and, up to a certain extent at least, made a trust the subject of inquiry and cognizance in a legal proceeding. We think the trust that is to be thus treated, must be a clear and simple trust, for the benefit of the debtor; the object of the Statute appearing to us to be, merely to remove the technical objection arising from the estate in land being legally vested in another person, where it is so vested for the benefit of the debtor." Judgment.

In our own Courts we have the cases of Doe *Lawrason* v. *The Canada Company* (*b*), and *McLean* v. *Fisher* (*c*). In the later of these two cases Sir *John Robinson* said "He had not that equitable interest which could be taken in execution under the Statute of Frauds:

(*a*) 4 B. & Al. 690. (*b*) 6 U. C. O. S. 428 (*c*) 11 U. C. R. 620.

1876. Re O'Donohoe.

that is, he had not the beneficial interest which the *cestui que trust* of certain lands has when the trustee holds them simply to his use, and not upon any confidence which is inconsistent with an absolute right in the *cestui que trust* to claim the rents and profits."

I do not see that the registry laws better the petitioner's case. It is true that she has registered the deed from the sheriff to herself, but the whole case is before us, and if we see that the sheriff assumed to sell that which was not saleable she cannot ask that the Court should certify that she thereby acquired a good title.

Again, sec. 68 of the Registry Act of 1865 does not help the petitioner. The language of the section is, "No equitable lien, charge, or interest affecting land shall be deemed valid in any Court in this Province after this Act shall come into operation as against a registered instrument executed by the same party, his heirs or assigns." The trust deeds to which I have referred, were both registered long before the sheriff's deed to the petitioner. I can conceive no ground upon which the equitable interests thereby created should be held invalid as against a sheriff's deed made upon a subsequent execution.

Judgment.

I think it equally clear that the deed of 6th August, 1874, from *Maulson* to the petitioner cannot help her case. It was a flagrant breach of trust to which the grantor appears to have been tempted by the payment of $50. Assuming that she thereby acquired a legal title she certainly acquired no beneficial interest inasmuch as the grantor could transfer none to her.

The result is, that in my opinion the Referee arrived at a correct conclusion upon the points appealed. The appeal is dismissed with costs.

Allchin v. Buffalo and Lake Huron R. W. Co. 1876.

Trustee and cestui que trust—Insolvent estates—Accommodation indorsers.

In February, 1858, *S. & B.* and *E. B.* became accommodation indorsers for *A. B.* for the sum of $15,000, *E. B.* alone indorsed for an additional sum of $5,000, *A. B.* giving a chattel mortgage on his personal effects including certain bills, notes and over due accounts, as security against their liability as indorsers; at the same time *E. B.* executed to *S. & B.* a mortgage on his farm to secure them to the extent of $5,000 or so much as might remain unpaid of such $15,000 after applying the funds of the chattel property so mortgaged in payment thereof. In July following *A. B.* executed another indenture or trust deed, reciting such mortgage. and he thereby assigned all outstanding debts due or owing to him, including all bills, notes, *judgments*, and book accounts, to enable the indorsers "to pay, satisfy, and discharge the said accommodation paper so indorsed by them as aforesaid." In 1862, the witnesses, who had the management of the securities, had reduced the $20,000 indebtedness to about $6,900 when *E. B.'s* farm was sold and the sum of $5,000 secured thereon was paid to the banks, who held the accommodation paper, thus reducing the claim of the banks to $1,900 for which they accepted the composition notes of *S. & B.* at 8*s.* 9*d.* in the £, they having about this time made a composition with their creditors. Nearly all of these composition notes *S. & B.* subsequently paid. Sometime afterwards and before default in payment of any of the composition notes *S. & B.* became insolvent, an assignee of their estate was duly appointed, and the banks proved upon their estate for the unpaid composition notes. About a month afterwards *A. B.* became insolvent, and at the time of the present proceedings. *E. B.* had also become insolvent. Amongst the effects so assigned by the deed of July was a judgment against the defendants, The Railway Company, recovered against them by *A. B.*, which, together with one recovered against the Company in the names of *S. & B.* and *E. B.* was compromised at $1,500.

Held, that the deeds of assignment did not create a trust of the moneys received upon such compromise in favour of the banks; and that under the rule in *ex parte Waring* (*a*) their only right was to rank upon the estate of *S. & B.* for the composition notes remaining in their hands.

This was a creditor's suit brought against the Buffalo and Lake Huron Railway Company and others, and in the Master's office *James P. Clark*, as assignee of

(*a*) 19 Ves. 345.

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R. R. Strobridge and *Thomas Botham*, under the Insolvent Act of 1864, proved against the Company in respect of two judgments; the one having been recovered by one *Alexander Bunnell* (and who was a plaintiff in the original suit) and the other having been recovered in the names of said *Strobridge & Botham* and one *Enos Bunnell*. *Clark* claimed that the beneficial interest in both judgments belonged to *Strobridge & Botham*, and had passed by their assignment in insolvency to him as assignee. *Clark's* claim had been allowed by the Master, on the evidence of *Thomas Botham*, in his report, and subsequent to the report the judgments were compromised with the Railway Company at $1,500, which compromise the Court confirmed.

Statement.

Enos Bunnell then presented a petition to the Court claiming that the first judgment recovered in the name of *Alexander Bunnell* had been assigned to *Strobridge & Botham* and himself, and that it as also the other judgment recovered in their own names were held in trust for the Bank of British North America, and the Bank of Montreal. On this petition an order was made referring it to the Master at Brantford, to inquire and state to whom these judgments really belonged.

From the evidence adduced in the Master's office it appeared that in February, 1858, *Alexander Bunnell* was indebted to the banks named to a large amount (about $100,000), and being desirous of obtaining further accommodation the banks, after an ineffectual attempt to get him to transfer to trustees for them the whole of his real and personal estate, consented, in consideration of his transferring his real estate to trustees as security for his past indebtedness, to advance $15,000 on the indorsation of *Enos Bunnell* as first indorser, and *Strobridge & Botham* as second indorsers, and $5,000 on the indorsement of *Enos Bunnell* alone. The banks further agreed to keep the bills representing

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this loan afloat so long as *Alexander Bunnell* should continue to reduce his former indebtedness at the rate of $16,000 a year. *Alexander Bunnell* at the same time agreed to secure *Strobridge & Botham* and *Enos Bunnell* against their indorsements by a chattel mortgage on all of his personal property, including certain bills, notes, and overdue accounts (but not mentioning any judgments), and *Enos Bunnell* also agreed to secure *Strobridge & Botham* for their indorsements to the extent of $5,000, or so much as might remain of the $15,000 to be indorsed by them (*Strobridge & Botham*) "after first applying *the whole proceeds of the chattel mortgage* property in payment of such indorsements," and gave them a mortgage on his farm as security therefor. The banks made the advance agreed upon, but in June following some produce purchased with these advances was seized by certain execution creditors, and on July 17th *Alexander Bunnell* executed another indenture or trust deed, which, after reciting the chattel mortgage of February, contained the following: "And the said party of the first part as and for a further security to the said party of the second part has agreed to assign and convey to the said party of the second part, all outstanding debts, due or owing to him, including all bills, notes, *judgments*, book accounts, and books, with which (along with the said mortgaged property) to enable the said parties of the second part to pay, satisfy, and discharge the said accommodation paper so indorsed by them as aforesaid." And the deed was expressed to be upon trust, first, to pay and reimburse themselves all reasonable expenses, costs, and trouble, incident to the execution of the trust: second, to pay labourers: third, to pay, satisfy, and take up the said accommodation paper." *Strobridge & Botham* and *Enos Bunnell* managed the securities, and thereout from time to time made payments to the banks, reducing the claims of the banks for the advances of $20,000 in 1858, to $6,900

Statement.

1876. in February, 1862, when *Strobridge & Botham* made a composition with their creditors at 43¾ cents in the dollar. *Enos Bunnell's* farm was at the same time sold, and the $5,000 secured thereby, applied towards payment of this balance, leaving about $1,900, for which the banks took the composition notes of *Strobridge & Botham.*

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In 1864 *Strobridge & Botham* went into insolvency after having paid all the composition notes except about $360. The banks proved on the estate of *Strobridge & Botham* for the balance of these composition notes and received dividends therefor. In their proof before the assignee the banks did not claim to hold any security for their debt. The securities under the chattel mortgage and deed of July, 1858, with the exception of these two judgments appear to have been realized and it was conceded that these passed to *Strobridge & Botham* and *Enos Bunnell* only by the deed of July, 1858. The principal question before the Master was, whether there was, by virtue of the chattel mortgage or deed of July, 1858, any trust created in favour of the banks, and whether if there was a trust they could claim against the judgments more than the balance due on the composition notes. The Master reported that the judgments belonged to *Strobridge & Botham* and *Enos Bunnell* in trust, but allowing as a first charge $95 solicitors' costs, paid by *Clark,* the assignee, in prosecuting the original creditors' suit, and also a second charge of $300 for services of *Strobridge & Botham* in managing the mortgage securities, and allowed as a third charge the amount due the banks at the time of the composition, but deducting therefrom the composition notes paid, and the dividends received from the assignee *Clark.* These sums would exhaust the $1,500 at which the claim against the railway had been compromised. The Master also reported specially, amongst other matters, at the request of the petitioners, that the

Statement.

affidavit filed by *Clark* in the Master's office, on proving his claim shewed that *Strobridge & Botham* and *Enos Bunnell* were the legal owners of one of the judgments and the equitable owners of the other, but that none of them had been made parties in the Master's office. 1876. Allchin v. Buffalo.

From this report of the Master, *Clark* appealed on the grounds (1.) "That the said Master had erroneously found that the two judgments in the petition, and in the order of reference named belong to the petitioners as trustees; whereas he should have found that the said judgments were held by the said petitioners under and by virtue of the chattel mortgage and deed of July, 1858, in the petition named as security in the first place to the said *Strobridge & Botham* for their indorsements of $15,000 in the said chattel mortgage and deed mentioned. (2.) That the said Master should by his said report have found that the said *James P. Clark*, as assignee under the Insolvent Act of 1864, of the said *Strobridge & Botham*, was entitled to a first lien or charge on the said judgments for the following sums, namely: (*a*) For the sum of $850 with interest thereon from the 8th day of February, 1862. (*b*) For the sum of $600 with interest thereon from the 8th day of February, 1862, instead of $300 as remuneration for the services and disbursements of said *Strobridge & Botham* in and about the management and sale of the said chattel property. (*c*) For the sum of $1,078 with interest thereon from the 8th day of February, 1862, being the amount chargeable by the said *Strobridge & Botham* as commission for indorsing $15,000 discounts as per agreement. (*d*) For the sum of $418.83 with interest thereon from May 1st, 1865, being the dividend paid by said *James P. Clark* as such assignee in respect of claims filed by the said *Bank of British North America* and the said *Bank of Montreal*. (*e*) For the sum of $95 paid by the said *James P. Clark* for prosecuting the said suit with interest thereon as in the Statement.

1876. Allchin v. Buffalo. said report is allowed. (3.) That the said Master should have held that the said petitioners and the said *Bank of British North America*, and the said *Bank of Montreal* were estopped from setting up any claim to the said judgments in priority to the said claims of the said *James P. Clark*. (4.) That the said Master should have found that the said *Bank of British North America* and the *Bank of Montreal* have been paid in full the said sum of $15,000, for which the said *Strobridge & Botham* were indorsers. (5) That the said Master has erroneously, improperly, and incorrectly at the request of the said petitioners reported the several special matters in the said report mentioned."

April 6th. Mr. *Moss* and Mr. *Fitch*, for the appeal.

Mr. *V. Mackenzie*, contra.

Cornthwaite v. *Frith* (*a*), *Garrard* v. *Lauderdale* (*b*), *Joseph* v. *Bostwick* (*c*), *Field* v. *O'Donoughmore* (*d*), *Inglis* v. *Gilchrist* (*e*), *Smith* v. *Fralick* (*f*), *Gould* v. *Robertson* (*g*), *Ex parte Smart* (*h*), *Lewin* on Trusts, 450–457, *Smith's* Leading Cases, vol. 2, page 70, were, amongst other authorities, referred to.

April 19th: Judgment. PROUDFOOT, V. C.—I do not think the deeds of the 15th February and 17th July, 1858, created trusts for the banks. That of February was indeed given by *Alexander Bunnell* to *Enos Bunnell*, *Strobridge & Botham*, in pursuance of the stipulation in the deed of 23rd January, 1858, to which *Alexander Bunnell*, the banks, and *Enos Bunnell*, and *Strobridge & Botham* were parties, but it was given to secure *Enos Bunnell* and *Strobridge & Botham* against their accommodation

(*a*) 4 D. & S. 552.
(*b*) 3 Sim. 1, S. C. 2 R. & M. 451.
(*c*) 7 Gr. 332.
(*d*) 1 Dr. & W.
(*e*) 10 Gr. 301.
(*f*) 5 Gr. 612.
(*g*) 4 D. & S. 509.
(*h*) L. R. 8 Ch.

indorsements on *Alexander Bunnell's* paper; and that of July was expressly made as a further security to these indorsers. It is under this latter deed that the judgments, the subject of the appeal, pass.

It appears from the correspondence of the agents of the banks with their principals, that *Alexander Bunnell* at first absolutely refused to assign to the banks his personal property, desiring to retain it to enable him *to work his account to advantage.* But ultimately the agreement assumed the shape it bears in the deed of 23rd January by which *Alexander Bunnell* was to assign to the indorsers his *personal chattels* for *their* security. Mr. *Geddes,* the agent of one of the banks, in his letter of the 19th January explains the nature of the arrangement at that stage of the negotiations. "The banks (who were acting in concert) to advance £5,000, in the shape of a produce credit to enable *Bunnell* to carry on his business, upon *Strobridge & Botham's* indorsements for £2,500, and *Enos Bunnell's* for £2,500, *Enos Bunnell* mortgaging his farm, valued at £2,500, as security, and both *Strobridge & Botham* being secured by a chattel mortgage on *Alexander Bunnell's* moveable property." Between the 19th and the 23rd January a further modification was made, which is embodied in the deed of the latter date. By this it was arranged that of the $20,000 advance, $15,000 was to be on *Alexander Bunnell's* paper, indorsed by *Enos Bunnell,* and by *Strobridge & Botham,* and the other $5,000 to be indorsed by *Enos Bunnell* alone. And by an agreement and indenture made between *Enos Bunnell* and *Strobridge & Botham* on the same 23rd January, stating the prior agreement of *Enos Bunnell* to indorse as first indorser, and of *Strobridge & Botham* to indorse as second indorsers $10,000, and of the other $10,000 on *Enos Bunnell's* sole indorsement, and that it had been since agreed that *Strobridge & Botham* should indorse to the extent of

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1876. Allchin v. Buffalo. $15,000 as second indorsers; and that for $5,000 parcel of the $15,000, or so much thereof as should remain unpaid after first applying for that purpose the money or proceeds to be realized from the chattel mortgage, it should be secured by a charge or incumbrance to that amount upon the farm and premises of *Enos Bunnell*. By that indenture *Enos Bunnell* then conveyed his farm to *Strobridge & Botham* upon a condition to be void if *Enos Bunnell* should pay the sum of $5,000 of such portion of $15,000 so indorsed, as should remain unsatisfied after first applying in payment thereof the money and proceeds to be realized upon or from the said chattel mortgage security.

Mr. *Grier*, the agent of another of the banks, states the negotiations with *Alexander Bunnell* in similar terms to Mr. *Geddes*; "that at first *Alexander Bunnell* would not execute the instrument giving us over his chattels, and claimed he must have entire control and ownership of them." On the 14th January he again writes: "The position we now occupy is certainly best, all things considered, that we could have. The banks will have all *Bunnell's* real estate, also *Yardington's*, besides as sure a guarantee as can be had for the further application of what may be realized from chattels, &c., to the reduction of the debt."

Judgment.

There is no other letter in regard to this matter until July.

Alexander Bunnell continued to carry on his business till July 1858, when, some of his property having been seized upon execution, the deed of the 17th of that month was made between him of the first part, and these indorsers of the second part, whereby as and for a further security to them, he assigned to them absolutely the goods mentioned in the chattel mortgage; also, all

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outstanding debts, due, or owing to him, including all bills, promissory notes, judgments, books and book accounts, including all rents owing; upon trust to sell and collect, and pay expenses, costs, and trouble incident to the execution of the trusts, then to pay laborers and servants, and next to pay, satisfy, discharge and take up the accommodation paper indorsed by these indorsers, amounting to the sum of $20,000 and costs, and interest, &c., to apply the residue to certain creditors named in the schedule (two, *Charles Watt* and *Jacob Choate*), and surplus to the assignor.

In none of these instruments is there a word said of the personalty being assigned in trust for the banks. It is throughout for the benefit, protection, and indemnity of the indorsers. And so long as the indorsers remained solvent they might have made any disposition they pleased of the property, and the holders of the notes could have no lien or equity in regard to them. *Smith* v. *Fralick (a)*, *Commercial Bank* v. *Poore* (*b*). Judgment.

I have already referred to the correspondence of the bank agents as to the chattel mortgage of 15th July. In reference to the deed of 17th July, Mr. *Geddes* writes: "*Bunnell*, finding that he cannot protect his brother and *Strobridge & Botham* in any other manner has been prevailed upon to make an absolute assignment of his chattels to *Strobridge & Botham* and his brother, who are now in possession of his books and effects, and who will protect themselves to the extent of $20,000, lately indorsed by them for his accommodation." And Mr. *Grier* writes: "It is, therefore, without question better that *Strobridge & Botham* should step in while there is sufficient left to cover their indorsements of £5,000, and secure it to the exclusion of all other parties."

(*a*) 5 Gr. 612. (*b*) 6 Gr. 514.

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It seems plain from this that the banks knew of the assignment to the indorsers, and ascribed to it the effect I have deduced from the instrument itself, that it was not a security to the banks but to the indorsers.

Mr. *Robertson*, the manager of one of the banks subsequent to Mr. *Geddes*, and who at the time of these transactions was accountant in the bank, has been examined. His position as accountant would not be likely to give him familiar acquaintance with these negotiations. He says he was consulted by Mr. *Geddes*. He was not at the meetings where the advances were negotiated, but he heard what was done from the bank solicitor. And from such sources of information, he says, the chattel mortgage was given to secure the debts advanced by the banks. He so speaks of it from his remembrance at the time. He understood the chattel mortgage operated "not merely as a security for indorsers, but that it was a trust for the banks. The chattel mortgage would, I presume, secure the indorsers as well as the banks. I understood the transaction to be one for the security of the bank." And so on through several pages of depositions. But he says he knew nothing of the subsequent trust deed, so that he could not have been acquainted by Mr. *Geddes* with that fact.

Judgment.

The first remark on this witness's depositions is, that they are not the best evidence, and so are not evidence at all. His information is derived from other sources which have not been resorted to. And again, this vague, indefinite *hearing*, *considering*, and *understanding*, cannot for a moment be placed in the scale with the clear and distinct *literæ scriptæ* of his principal.

It was also argued that the deed of July was, upon its face, a deed for the benefit of creditors ; that it was

communicated to the banks; and that upon the faith of it time was given for the payment of the $20,000. If this were so doubtless the banks would be entitled to the benefit of it. *Goodeve* v. *Manners* (*a*). 1876. Allchin v. Buffalo.

But the deed does not provide for the payment of the sums due to the banks as creditors; it is for the purpose of taking up the accommodation paper indorsed by the indorsers for their security and indemnity; this is one mode of indemnifying them by paying the paper on which they were liable; and that is the leading idea pursued throughout the deed, not to benefit the bank, except in so far as that might result from protecting the indorsers.

Then, what was communicated to the banks? Was it that this deed was executed for their benefit? So far from it, that in the correspondence I have quoted the bank agents speak of it as a security for the indorsers, and it is so recited in the deed itself. They did not conceive they had any interest in this arrangement. Throughout the negotiations for security with *Alexander Bunnell* he had persistently refused to give his personal property to the banks, he wanted to retain complete control over it to work his account to advantage. He had given to the banks all his real estate for their security, he retained the personal estate to give security to his indorsers. Judgment.

This being the manner in which the banks understood the arrangement of July, it is obvious that while Mr. *Geddes* and Mr. *Grier* were managers of their respective banks no time could have been given for the payment of the $20,000 paper on the faith of it. Mr. *Geddes* remained manager of the Bank of British North America till 1864, Mr. *Grier* of the Bank of Montreal till 1862, and it is in evidence that no re-

(*a*) 5 Gr. 101.

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newals of the paper were made after June, 1862, and rather, I should imagine, after 8th February, 1862, when the composition was made with *Strobridge & Botham.*

The acceptance of this composition is of itself cogent evidence of the view the banks took of this deed. For it is hardly possible to conceive they would have accepted a composition, had they supposed they had any rights under this deed, until the security had been realized. And this composition was agreed to by the managers, who, we have seen, were aware of the existence of the deed.

The petition is filed upon the basis of the indenture of July, creating a trust for the banks, which, I think is not established. And the finding of the Master, that the payments belong to the banks, is therefore erroneous.

Judgment.

But I understand from the course of the argument that it was urged before the Master the banks have a right to these securities upon the authority of *Ex parte Waring* (*a*).

It seems that *Strobridge & Botham* compounded with their creditors on 8th February, 1862, for 8*s*.9*d*. in the £, or 43¾ cents in the $, which the banks accepted, taking six promissory notes for the amount of their indebtedness. Three of the notes were paid to one bank and four to another, and before any default made in payment of them, *Strobridge & Botham* became insolvent in September, 1864; *Alex. Bunnell* became insolvent in October, 1864., and *Enos Bunnell* has also become insolvent. The banks proved upon *Strobridge & Botham's* estate for the unpaid balance of the composition notes and have received dividends.

(*a*) 19 Ves. 349; 2 Rose 182.

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Assuming that the case in this aspect came properly before the Master, (although but for the consent of counsel I would have thought otherwise, as no case of the kind is made in the petition, it not appearing in it that *Enos Bunnell* is insolvent, and while any of the parties to the notes remain solvent the rule in *ex parte Waring* does not apply. *Smith* v. *Fralick*, *Commercial Bank* v. *Poore*, *supra*,) I think it is a case to which the decision in *ex parte Waring* applies, and that the holders have a right to get the benefit of the securities given by the makers to the indorsers though they have no species of right to the securities themselves. It is an equity that exists independent of any contract, but springs out of the necessities connected with the administration of two insolvent estates. Per Lord *Cairns* *Banner* v. *Johnston* (*a*). Or, as expressed by Lord *Hatherley* in *City Bank* v. *Luckie* (*b*). The bill-holder comes in, not on account of any special lien he has upon the property, but because the person from whom he holds has a security, which security cannot be taken away until all liability upon the bills is at an end. Thus *Alexander Bunnell's* estate claiming the value of the security, subject to the charge, is unable to get back the security, unless all the duties that attached to it had been fulfilled. On the other hand *Strobridge & Botham's* estate was not in a condition to make payment of the notes, and thus to come upon the security for indemnity. The solution of the difficulty is, to sell the security and pay the notes.

Judgment.

It is immaterial that the insolvencies did not take place at the same time, or that *Strobridge & Botham's* composition, and subsequent insolvency, preceded that of *Alexander Bunnell.* It is enough that when the relief is sought both are insolvent.

The application of the rule in *ex parte Waring* is

(*a*) L. R. 5 H. L. 157, 174. (*b*) L. R. 5 Chy. 773, 777.

1876. Allchin v. Buffalo.

comparatively easy when the indorser holding the security has paid none of the notes. When, however, he has paid some but not all, and the security was given for his indemnity, all that the holder of the notes can require is, that what remains, after indemnifying the indorser, should be applied for his benefit. Were any other rule to prevail I would be taking away from the persons who really owned the security the value of it. The payments were made upon the faith of it, and to give the holder the benefit of it without allowing these payments, would give him an unjust advantage at the expense of the surety. In adjusting the equities between the two estates at the date of the insolvency, it is quite plain that *Strobridge & Botham* would have been entitled to hold the securities till paid their advances. In *ex parte Alliance Bank* (*a*), *Murray* borrowed money from the Rolling Stock Company, for which he accepted and gave to them bills of exchange, and deposited shares as collateral security. When the bills became due he wished the loan continued, and the managing director of the Company sent him for acceptance fresh bills, with a letter, stating them to be in place of those falling due. *Murray* accepted the new bills on that footing. He afterwards died insolvent, and the Company was ordered to be wound up, and was utterly insolvent. Both sets of bills had been negotiated and were outstanding. The holders of the first set of bills applied to have them paid by means of the deposited shares. But as the Company, after receiving the new bills in place of the old ones, were bound to indemnify *Murray* against the old ones they had no right to apply the shares in payment of them. The principle of that case is strictly applicable here; and the proceeds of the chattels must first be applied in paying the advances made by the indorsers. It is an equity that *Strobridge*

Judgment.

(*a*) L. R. 4 Chy. 423.

& Botham's estate had against *Alexander Bunnell's* estate and the right of the holders has to be worked out through these equities. 1876. Allchin v. Buffalo.

Loder's Case (*a*) is another phase of the application of the principle—deciding that if by any means the holders have recovered from the insolvent estate more than the value of the deposited securities, they have no right to the proceeds.

The amount for which the judgments in question were compromised, $1,500, has been paid, the compromise having been approved by the Court; $200 seems to have been withdrawn, but it does not appear how much has been realized from the assigned securities, nor how much has been paid by *Strobridge & Botham* and *Enos Bunnell* on the indorsed paper. If this cannot be agreed upon, it must be referred back to the Master to ascertain. But the indorser cannot be fully indemnified unless all the claims he has on the assigned property by agreement with the principal be fully discharged, and this, whether the terms were known to the holder or not. The holder being entitled, not by virtue of contract, but upon an equity arising from necessity, as between the estates of the maker and indorsers the latter would be entitled to the commission agreed upon for indorsing. An agreement to that effect, and the amount of the commission has been established, and has not been regarded by the Master. The amount of the commission must be allowed to *Strobridge & Botham's* estate. Judgment.

Again, the rule in *ex parte Waring* is to be applied in this way, viz., to apply the proceeds of the security at the time of the insolvency, or perhaps when the notes fall due if that precedes the insolvency; and the holder should not have proved for more than the difference,

(*a*) L. R. 6 Eq. 491.

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and if he could not help it because at that time the security was not realized, and he did not know the amount for which he ought to have proved; then, when the amount is actually ascertained and paid to him the proof ought to have been reduced, and if he has received the dividends they ought to be paid back. In *re Barned's Banking Company ex parte Joint Stock Discount Company* (*a*). The Master of the Rolls says, after Lord *Eldon* (p. 10): "That in order to put matters in the right position as between the original giver and receiver of the security, you must apply the proceeds of the security to the payment of the bills, not for the sake of the bill-holder, not as a kind of security to him, but as a mode of working out the equities between the insolvent estates of those two original parties to the security. But if the bill-holder gets money to which he is not entitled in any way, except as a means of working out that equity, he is to take it as paid at the first moment when the securities ought to be realized."

Judgment

When a creditor compromises with his debtor, and there has been no default in paying the composition at the time of the debtor's insolvency, as was admitted to have been the case here, the creditor can only prove for the composition. The original debt does not revive even where there is an agreement to revive, in default of payment of those notes, and *a fortiori* where, as here there was no such agreement. *Ex parte Peel* (*b*), *In re McRae* (*c*). In ascertaining the amount for which the note-holders can claim the securities as against *Strobridge & Botham's* estate, therefore, the debt must be taken at the amount of the composition.

The agreement between the parties was to make *Strobridge & Botham* subsidiary sureties to *Enos Bunnell*, and thus to leave them liable according to the order

(*a*) L. R. 19 Eq. 1, 13; S. C. on app. L. R. 10 Chy. 198.
(*b*) 1 Rose 435. (*c*) 15 Gr. 408.

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in which they indorsed the notes, and not to make them co-sureties. This seems plain from the agreement that *Enos Bunnell* was to be the first indorser, and *Strobridge & Botham* second indorsers; that *Strobridge & Botham* were only to indorse for $15,000, while *Enos Bunnell* was to indorse for $20,000, and that for $5,000 of the $15,000, *Enos Bunnell* was to give *Strobridge & Botham* a security on his land. These provisions would have been insensible if they were to be co-sureties.

The result is, that the assigned property must be applied first in indemnifying *Strobridge & Botham* for all that they have had to pay on their indorsements, and for proper charges against the property, any surplus beyond that in reduction of the unpaid notes of the $15,000, and for the balance of the $15,000, compounded at 43¾ cents in the $, not thus liquidated, proof may be made on their estate, the dividends received must be refunded.

Judgment.

Among the proper charges are the expenses, costs, and trouble, incident to the execution of the trusts as provided for by the deed of July. The Master has allowed $300 for this. There is not much evidence on the subject, and I am very unwilling to interfere with the discretion of the Master on such a subject. *Botham* says "That $600 for our charges for services are reasonable. The amounts were very large and a great deal of travelling was necessary to look after them, and it took four years to wind up the affairs of *Bunnell* * * The $150 a year charged I consider reasonable for our travelling and other expenses connected with the management. Mr. *Strobridge* went to London at one time to see about a seizure of some of the trust estate, and also to Stratford. The time charged for is from the time trust deed given until the composition notes were given, covering about five years." *Enos Bunnell*, who is the active prosecutor of this petition,

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says "*Strobridge* went once to Stratford for my brother after the chattel mortgage, and before trust deed; but I paid his expenses. I don't know what services they could have rendered worth $150 a year to the trust estate. Don't think Mr. *Strobridge* or Mr. *Botham* went to any other place than Stratford in connection with business of the trust estate; did not do so that I am aware of." He also says *Alexander Bunnell* was engaged for some time in managing the trust estate. Clerks were employed; does not know if they were paid out of the trust estate or not. The trust affairs were managed at the same office as his own business. The value of the property assigned seems to have been estimated at about $24,000, and consisted of property requiring attention.

That seems to me to be all the evidence on the subject, and considering the nature and amount of the property assigned and the care required in looking after it; that the amount is sworn to be a reasonable charge, and that the only evidence against it is of the vaguest description, I would have been better satisfied with an allowance of the larger sum, which seems moderate. Without absolutely allowing the appeal on this point I will refer it to the Master to reconsider it.

Judgment.

Enos Bunnell made the principal payments on the indorsed paper, arising from the sale of the chattels, and he applied them *pro rata* on the whole $20,000. This I take to have been contrary to the agreement of 23rd January, 1858, between him and *Strobridge & Botham*; an agreement of which the banks were aware, and by which the proceeds were to have been applied, first in payment of the $15,000 indorsed by *Strobridge & Botham*, and indeed this naturally results from the position of the parties, *Strobridge & Botham* being only secondarily liable as between them and *Enos Bunnell*. This petition is filed by *Enos Bunnell* in the

names of himself, *Strobridge* and *Botham*, seeking to have a trust declared for the banks, and it is a term of the alleged trust that the proceeds of the chattels should be applied in this way. The account must be corrected in this respect. 1876. Allchin v. Buffalo.

I do not think the banks are estopped by having proved on the estate of the insolvents, nor by omitting to state they had the security of the judgment. In my judgment they had not that security. Their right was to be worked out through the equities between the parties, and the dividends received can be repaid.

From the foregoing statement of my views, the Registrar will be able to determine what grounds of appeal are allowed, and what overruled. The costs of each will follow the result.

The last clause of the report made specially at the request of the petitioner, seems to me of no value, and to be contrary to the practice of the Court. The Master does not make the report of certain facts found by him as the result of evidence adduced before him, but merely something that was contained in the affidavits filed on proof of claim in the Master's office. If it is intended to represent findings of the Master, I think they are all disposed of by what I have just read, *McCagar* v. *McKinnon* (*a*), *Sovereign* v. *Sovereign* (*b*). Judgment.

(1.) This Court doth allow the first and fifth grounds of the said Appeal, and doth over-rule the third ground of said Appeal. (2.) And as to the second ground of the said Appeal this Court doth allow the same except that the said Master is to take an account of the amounts to which the Minutes.

(*a*) 15 Gr. 361. (*b*) 15 Gr. 550.

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said *James P. Clark* is entitled in respect of payments by *Strobridge & Botham* on their composition notes, and for commission, being respectively items (*a*) and (*c*) under the said ground on the reference back hereinafter contained; and except as to item (*b*) under the said ground, as to which the said Master is to reconsider his finding on the said reference back. (3.) And as to the fourth ground of the said Appeal, this Court doth declare that the proceeds of the chattel property paid to or received by the said banks ought to have been applied first in the payment of the $15,000, indorsed by said *Strobridge & Botham* before any part thereof was applied to the payment of the $5,000 indorsed by *Enos Bunnell* alone, and that in ascertaining the amount for which the holders of the notes indorsed by *Strobridge & Botham* can claim the securities as against *Strobridge & Botham's* estate, the debt must be taken at the amount of the composition. (4.) And it is further ordered that the Master do, on the said reference back, take an account of the payments made by *Strobridge & Botham* and their estates on their indorsements, and for their proper charges and commission, charging them with any sums received by said *Strobridge & Botham*. (5.) And this Court doth refer it back to the said Master to review his said report in respect of the matters aforesaid having regard to the foregoing declaration and directions. (6.) And it is further ordered that the said Master do tax to the said appellants the costs of the first, second, and fifth grounds of the said Appeal, and to the respondents the costs of the third ground of the said Appeal, and that the same be set off, and the difference be paid by the defendants the petitioners and the defendants the Banks, forthwith after the same is ascertained.

Minutes.

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DRIFFILL v. GOODWIN.

Vendor and purchaser—Notice of defect in title—Solicitor acting for both vendor and vendee—Notice to intended partner.

Though the rule of the Court is, that notice to the solicitor of a purchaser is notice to the client of any question affecting the validity of the title, this does not apply where the information he obtains from the vendor is such as it may be said shews that the vendor and solicitor were conspiring together to effect a fraud: therefore, where the same solicitor acted for the vendor and purchaser on the sale of property, and it was shewn that the vendor had previously told the solicitor that he desired to sell his property in order to avoid paying certain demands against him.

Held, that this was a case in which the Court would not impute to the client (the purchaser) knowledge which his solicitor possessed.

In such a case the duty of the solicitor clearly is to refuse to be a party to any arrangement whereby the vendor intends to cheat his creditors; but if unable to do this he should not act for the purchaser, whom he thus places in a position of peril: and in no case, unless when necessity compels him to do so, should a solicitor act for both vendor and purchaser in the purchase and sale of property.

M. and *G.* were negotiating for the formation of a partnership to be carried on in respect of premises which *G.* was negotiating for the purchase of, during the pendency of which and on the day before the purchase was completed *M.* was informed that the object of the vendor in disposing of this property was to defraud his creditors, but which information *M.* did not communicate to *G.*

Held, that this was not sufficient to affect *G.* with notice; although on the completion of the purchase *M.* might have some rights against *G.* in respect of the property so purchased.

Statement.

This was a bill filed by *Samuel Driffill*, official assignee of *Matthew B. Cockerline*, against *Joshua R. Goodwin* and *Matthew Cockerline* seeking to set aside a conveyance of certain real estate, embracing a mill property, and also certain personal property made by the insolvent, *Matthew B. Cockerline*, within thirty days of his insolvency, to *Goodwin*.

On the examination of witnesses it appeared that the insolvent, being greatly embarrassed, formed the design

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of conveying away his lands and personal property with a view of preventing its being taken in execution for what he considered to be an unjust claim, which design he communicated to his solicitor, and who subsequently acted in preparing the conveyances between the parties. The defendant *Cockerline*, held a mortgage from *Goodwin*, as a first incumbrance given in pursuance of an agreement to that effect, in consideration of his joining in the conveyance to *Goodwin*, and releasing certain claims which he held upon the property. The evidence established satisfactorily that his claim was *bonâ fide*, and thereupon the plaintiffs agreed to confirm his title, without regard to the result of the case as against the principal defendant, who was examined in the cause, and denied distinctly all notice of any fraudulent intent on the part of the insolvent, and stated that he had for some time been looking out for a property of this kind to purchase; that he heard of the insolvent's property being for sale and entered into

Judgment.

a treaty with him for the purchase thereof, and concluded the same in the utmost good faith, and had paid the stipulated cash payment, and executed the necessary mortgages for the balance before hearing of any fraud being intended, or having any reason to doubt the perfect honesty of the insolvent in the transaction. One *Mayes* who had agreed to go into partnership with *Goodwin* in the milling business, was examined as a witness, and he proved having been informed of the fraudulent intention of *Matthew B. Cockerline* the day preceding the completion of the purchase, but that he had not communicated this information to *Goodwin*.

The other facts of the case appear in the judgment.

Mr. *Boyd* and Mr. *Wells*, for the plaintiff.

Mr. *Moss*, for defendant.

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Kennedy v. *Green* (*a*), *Cameron* v. *Hutchinson* (*b*), *Agra Bank* v. *Barry* (*c*), *Re Rorke's Estate* (*d*), *Sharpe* v. *Foy* (*e*), *Espin* v. *Pemberton* (*f*), *Sykes* v. *Bond* (*g*), *Re Barker's Estate* (*h*), *Wyllie* v. *Pollen* (*i*), *Perry* v. *Holl* (*j*), *Re McKenzie* (*k*), *Bank of Montreal* v. *McWhirter* (*l*), *Maxfield* v. *Burton* (*m*), *Rolland* v. *Hart* (*n*), *Collver* v. *Shaw* (*o*), *Leys* v. *McPherson* (*p*), *Re Colemere* (*q*), *Hewitt* v. *Loosemore* (*r*), *Carruthers* v. *Reynolds* (*s*), *Doyle* v. *Lasher* (*t*), *May* on Fraudulent Conveyances p. 149, were referred to.

May 17th.

BLAKE, V. C.—I have no doubt on the evidence that the defendant *Goodwin* in good faith purchased the premises in question from the insolvent. He agreed to pay the full value of what he was purchasing, and completed his agreement before he had actual notice of the insolvency. For a considerable time before *Goodwin* bought, he had desired to acquire such a property as that in question, and no reason was shewn in evidence, nor was any assigned in argument why he should have sought to benefit the insolvent or defraud the creditors of the insolvent, nor why he should have entered into a doubtful transaction as to any of the property, the subject of the present suit. The defendant *Goodwin* offered, as the sale took place within thirty days of the issue of the attachment in insolvency, to transfer to the assignee the property he purchased, if he were indemnified. This the plaintiff would not agree to do. If the sale can be impeached, it must be because

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(*a*) 3 M. & K. at 719.
(*b*) 16 Gr. 526.
(*c*) L. R 7 E. & I. App. 135.
(*d*) 14 Ir. Ch. 442.
(*e*) L. R. 4 Ch. 35.
(*f*) 3 DeG. & J. 547.
(*g*) 7 Jur. N. S. 1024.
(*h*) 23 W. R. 944.
(*i*) 32 L. J. Ch. 782.
(*j*) 2 D. F. & J. 38.
(*k*) 31 U. C. R. 1.
(*l*) 17 U. C. C. P. 566.
(*m*) L. R. 17 Eq. 15.
(*n*) L. R. 6 Ch. 678.
(*o*) 19 Gr. 599.
(*p*) 17 U. C. C. P. 206.
(*q*) 12 Jur. N. S. 38.
(*r*) 9 Hare 449.
(*s*) 12 U. C. C. P. 596.
(*t*) 16 U. C. C. P. 263.

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the purchaser had constructive notice, either through *Mayes* or *Stevenson*. *Mayes* had notice the day before *Goodwin* completed his purchase, that the insolvent desired to sell his property so as to prevent what he considered an unjust claim being enforced against him. *Mayes* and *Goodwin* were negotiating for a partnership, and what was being purchased from the insolvent was intended to be the subject matter of this partnership. It was argued that in this manner notice to *Mayes* affected *Goodwin*. I do not think this is so. *Goodwin* purchased in order to acquire a beneficial interest for himself in the premises : at this time he had no notice or knowledge of any matter which should have prevented his closing this transaction. If he completed the purchase probably *Mayes* might have had some rights against him in respect of the property acquired, but I think it would be stretching too far a doctrine which the recent authorities are limiting, to say that under such a state of matters constructive notice can be traced to a man who, in good faith, completes his purchase and pays down the cash payment to be made.

Judgment.

Nor do I think that notice is brought home to *Goodwin* through the knowledge of *Stevenson*, the solicitor who prepared the conveyance from the insolvent to him. *Stevenson* says that some time before the preparation of this conveyance *Cockerline*, the insolvent, told him that he wanted to sell his property in order to avoid paying his debts: that *Cockerline* told him this as his solicitor in confidence as a matter which was not to be divulged to any one else ; that when this sale was being carried out he knew this, to be the object ; that *Cockerline* instructed him to draw the deed, and that he acted as much for the one as the other in the transaction..

There are certain cases in which the Court will not impute to a client knowledge which his solicitor possesses, and I think this is one of them. The

vendor informs the solicitor of the object he has in view, and unfortunately he does not object to aid him in defrauding his creditors. The solicitor is cautioned not to divulge the information given to him. These two men may then be said to be conspiring together to effect this object. The proposed purchaser does not ask the solicitor to investigate the title. The vendor instructs him to prepare the needed instrument to carry out the arrangement, and the purchaser attends at his office and takes from his hands the deed which evidences the agreement. I think, looking at the position of the solicitor, and the nature of the employment of him by the vendor and by the purchaser, that I cannot hold that the notice or knowledge of the solicitor affects the purchaser and invalidates the transaction. The duty of the solicitor was clear, he should at once have refused to be a party to any arrangement whereby the insolvent intended to cheat his creditors; or if he had not strength of mind enough to take this obvious stand, he at least should not have acted for another client in the same transaction when he must have known he was placing him in so perilous a position. It is at all times the duty of a solicitor, unless when necessity makes it lawful, to reject the retainer of both vendor and purchaser when dealing in the purchase and sale of property, but the non-fulfilment of this obvious duty becomes almost an unpardonable offence in a case such as the present, where the solicitor of the vendor has had facts connected with the title confided to him by the vendor, the knowledge of which if traced through him to his second client, would render invalid a title, which, if acquired by the aid of another solicitor, would have enabled him to hold the property absolutely.

Judgment.

Under the authorities, the purchaser would have been entitled to a specific performance of the agreement which affects realty as well as personalty. As no fraud

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The decree will be as consented to so far as the defendant *Cockerline* is concerned. There will be no costs up to the filing of the answer of *Goodwin;* the costs of *Goodwin* subsequent to that must be borne by the plaintiff who from that time has been contending for that in which he has failed.

French v. Taylor.

Administration of Justice Act—Injunction—Practice.

Each party to a suit is bound, under the Administration of Justice Act (1873), to apply to the Court first approached for the full measure of relief and protection to which he may consider himself entitled: Where, therefore, an action of ejectment was brought and the defendant limited his defence to a portion of the premises only, after which he commenced trespassing on the remaining portion, and the plaintiff thereupn applied to this Court for an injunction to restrain such acts, the Court, acting upon the principle above stated, refused the application.

The plaintiff was the proprietor of the "The Royal Opera House," in the city of Toronto, and also owned the premises on King street in front thereof, which were occupied by the defendant as a drinking saloon. The plaintiffs had instituted proceedings in ejectment to turn the defendant out of possession to which he appeared to defend for a part of the property in question—fourteen feet out of twenty-one feet—the seven feet for which he did not defend being a passage way leading from King street to the Opera House. After having put in his defence the defendant forced open a door leading from his saloon into this passage, and he and the parties frequenting his saloon trespassed thereon, and, as was alleged, rendered it unfit for the purposes for which the plaintiff desired to use it.

Statement.

The plaintiff, thereupon, filed a bill to restrain the defendant from thus trespassing on the said passage way, and moved for an injunction in the terms of the prayer of the bill. 1876. French v. Taylor.

Mr. *Moss*, Q.C., and Mr. *A. Hoskin*, for the plaintiff.

Mr. *W. Cassels*, contra.

BLAKE, V.C.—The plaintiff in this Court having brought ejectment at law, which action is there now pending, files the present bill to restrain the same defendant from injuring or interfering with any portion of the premises of which possession is sought by the proceedings at law. The acts complained of arose subsequent to the issue of the writ of ejectment. The defendant has limited his defence to fourteen of the twenty-one feet which are claimed by the plaintiff. If the action at law had been for a farm lot, and after the writ had been issued the defendant at law had commenced to trespass thereon by cutting down the timber, I do not see what excuse the plaintiff at law would have for coming into this Court, in place of applying at law to restrain the cutting, and asking for such order as his equitable rights might demand. It could make no difference that the defendant limited his defence to one acre of the farm. The Common Law Court could then allow judgment to be entered for the lot claimed, less this acre, and make such "order or decree as the equitable rights * * * require" as to the preservation of the premises to which the defendant admits he has no title: and as to the remaining acre, it would be as of course to prevent any injurious dealing in respect of it until the question of ownership was disposed of. I do not think it can make any difference, because, instead of this plain case for the interference of the Court of Law, one more complicated is presented to it. Each party to the suit is bound, I conceive, under the Administration of Justice Judgment.

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Act of 1873, to apply to the Court first approached for the full measure of relief and protection to which he may consider himself entitled, and until this is denied him he has no right to seek for a remedy in another Court.

Judgment.

I think the plaintiff must apply to the Court of Common Pleas for that which he is asking from this Court. I refuse the injunction. Costs can be reserved.

Carroll v. Carroll.

Infants' estate—Partition—Sale by mortgagee.

The Court will not countenance the unnecessary incurring of costs of filing a bill for the partition and sale of the estate of infants for the purpose of discharging a mortgage thereon, which object could be attained as effectually in the ordinary way by proceedings being taken at the instance of the mortgagee; and where such a suit was brought in the name of infants, the Court on dismissing the bill ordered the costs of the defendants to be paid by the next friend of the infants.

Motion for decree.

Mr. *Evans*, for plaintiffs.

Mr. *Rogers*, for defendants.

The facts appear in the judgment.

Judgment.

Blake, V. C.—This is a partition suit in which a bill is filed by infants; and the tenants in common are infant defendants. It was alleged by the Counsel for all parties that the property could not be advantageously partitioned, and, therefore, that it should be sold. The only reason assigned for putting the infants to the expense of a Chancery suit for the sale of these premises was, that there was a mortgage thereon, and as there was no means for its satisfaction, but this vacant lot of

land, it must be sold for its payment. It is also stated that the mortgagee is willing to consider the interests of the infants, the legal representatives of the mortgagor, and to do for them what will be most for their advantage in the matter. The property must, therefore, be sold to realize the claim of the mortgagee, and I am asked to sanction this sale by the process of this Court, which will involve the expenditure of a very considerable amount of money, rather than by the mortgagee in the ordinary way. I cannot see what advantage will accrue to the infants by proceedings taken in this Court. I stated this on the 24th of February, when the cause was heard before me, and as up to the present no reason has been assigned for making a decree in the cause, I dismiss the bill with costs, to be paid the defendants by the next friend. Should an advantageous offer be made for the purchase of the premises, an application can be made in Chambers for power to carry it out under ch. 12 C. S. U. C.

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Carroll v. Carroll.

Judgment.

Tibbs v. Wilkes.

Master and servant—Dismissal for cause—Yearly hiring.

Where a person in the service of another under a yearly hiring is dismissed for cause by his employer during the currency of any one year, he is not entitled to any remuneration for the portion of the year that he has served: but if he has been paid any portion of such year's salary the employer is not entitled to recover it back, neither is he entitled to have it applied on account of moneys payable in respect of a previous year's service; and although the employer on dismissing his employee may have assigned one ground therefor, he is not precluded from afterwards shewing the entire ground for such dismissal.

The plaintiff in this case whilst in the service of a mercantile firm in Montreal was applied to by an agent of the defendant, for the purpose of effecting an arrangement whereby the plaintiff was to enter the service of

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the defendant at a stated salary (£400 a year) and a sum equal to the profits on $5,000 of the capital computed at same rate as the whole amount of the capital earned, this latter amount being given, as alleged by the defendant, in order the more effectually to induce the plaintiff to take an interest in the business of defendant. The plaintiff accordingly entered into the defendant's service under these terms and continued in his employ for a year and nine months, when the defendant discharged the plaintiff for irregularities in his management of the business, which the Court considered fully justified the defendant in so doing.

The plaintiff instituted the present suit, claiming to be entitled to two years' salary, and an account of profits for the same period, and prayed relief accordingly.

Statement.

The defendant on his examination swore that during the time the plaintiff was so in the service of the defendant, the plaintiff had overdrawn his salary, in consequence of which the defendant refused to pay him any further sum, insisting that having discharged the plaintiff for cause he had not any claim against the defendant on account of his second year's salary, and that, therefore, what he had received on account thereof should be applied as against the first year's salary, and which would thus more than pay the plaintiff for such first year's salary, as also the stipulated profits on the $5,000, which it was attempted to be shewn the defendant meant should be interest on that sum computed at a certain given rate only.

Mr. *Lash*, for the plaintiff.

Mr. *Bethune*, for the defendant.

Judgment.

BLAKE, V. C.—At the close of the case I found on the facts that a part of the inducement the defendant held out to the plaintiff for leaving his former employer and coming to him was, the promise of payment in addition

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to a fixed salary of a sum of money equal to the profits of $5,000 of the capital of the defendant's business, at the same rate of profits which the whole capital earned. I found also that the defendant dismissed the plaintiff from his employment on the 1st of September, 1873, and that the conduct of the plaintiff justified this act of the defendant. It seems clear on the authorities that although an employer may dismiss an employé on one ground, he is not thereby precluded from shewing the entire ground of dismissal as a justification for dispensing, without notice, with the further services of the person dismissed: *Baillie* v. *Kell* (*a*), *Spotswood* v. *Barron* (*b*), *Cowan* v. *Melbourn* (*c*).

I think, looking at the position occupied by the plaintiff, and the other circumstances of the case, that the hiring here must be taken to be a yearly hiring: *Baxter* v. *Nurse* (*d*), *Beeston* v. *Collyer* (*e*), *Fairman* v. *Oakford* (*f*), *Williams* v. *Byrne* (*g*), *Turner* v. *Mason* (*h*), *Fewings* v. *Tisdale* (*i*).

Judgment.

The service was entered into on the 1st of December, 1871, and the first year's salary was earned, and as to this I am of opinion the plaintiff is entitled to an account of what is coming to him, and to an order for its payment. The second year's salary was never earned, as he left the defendant before the expiration of this term, and as the defendant has justified the dismissal, the plaintiff is not entitled to recover against the defendant any balance that may be due him for the portion of this second year spent in his service. What the plaintiff has received cannot be recovered back, but no claim can be made for the difference between the amount received and that which would, under an ac-

(*a*) 4 Bing. N. C. 638, 654.
(*b*) 5 Ex. 110.
(*c*) L. R. 2 Ex. 235.
(*d*) 6 M. & G. 935.
(*e*) 4 Bing. 309.
(*f*) 5 H. & N 635.
(*g*) 7 Ad. & El. 177.
(*h*) 14 M. & W. 112.
(*i*) 1 Ex. 295.

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count similar to that to be taken as to the first year, be coming to the plaintiff: *Cutter* v. *Powell* (*a*), *Robinson* v. *Hindman* (*b*), *Spain* v. *Arnott* (*c*), *Gandell* v. *Partigny* (*d*), *Atkins* v. *Acton* (*e*), *Lilly* v. *Elwin* (*f*). The plaintiff is, therefore, entitled to the account above indicated against the defendant for the first year, but to no relief as to the second year. If the parties cannot settle on the amount thus payable, and can complete the reference in a day, I will give them that time, in order that the whole matter may be closed without further delay or expense.

Wyld v. The Liverpool and London and Globe Insurance Company. [In Appeal.*]

Fire insurance—Uberrima fides—Reforming policy.

In transactions relative to fire insurance the utmost good faith should be observed on both sides. Parties who had obtained an interim receipt for insurance on their stock of goods in a building "S. T. No. 272," next day notified the agent of the insurance company that they had added to their former premises two flats of the adjoining building, and had cut doors in the division wall leading into such flats and in which they had then placed part of their goods upon. The agent thereupon visited and inspected the premises, when he informed the parties that the rate of insurance would have to be increased, to which they assented, stating their stock must be insured "under any circumstances." The parties paid the increased premium and obtained from the agent a receipt for the premium on an insurance "on their stock . . contained in a building . . on the south side of King street," and a policy in professed pursuance thereof was subsequently sent from the head office of the company (in Canada) in Montreal, on which a memorandum in pencil was written by the resident chief agent of the Company: "N.B.—There is an opening in the east end gable of the above through which communication is had with adjoining house," and which such agent swore was made by him "for the express

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* *Present*—Draper, C. J., Hagarty, C. J., Patterson, J., and Harrison, C. J.

(*a*) 2 Sm. Lea. Ca. 39.
(*b*) 3 Esp. 235.
(*c*) 2 Stark. 256.
(*d*) 4 Camp. 375.
(*e*) 4 C & P. 208.
(*f*) 11 Q. B. 742.

purpose of making it perfectly distinct and confining the risk to the house there mentioned. . . I framed the policy so as to cover only the stock in the one building. I wanted to make this sure . . thinking that the plaintiffs might perhaps think the goods in both buildings were being covered," but he never gave any intimation of such intention either to the assured or to the local agent.

Held, (1) affirming the decree of the Court below, that under the circumstances the assured were entitled to recover for damage by fire done to the goods in both buildings, and that, if necessary to do so, the policy would be reformed in this respect; (2) that the interim receipt was intended to cover and did cover the goods in both premises, and the policy subsequently issued was not in accordance therewith; the right of action on the receipt remained, and the assured are entitled to recover for a loss sustained in respect of the goods contained in such added flats.

After the decree was pronounced as reported ante volume xxi. page 458, the defendants in the suit reheard the cause.

Mr. *Edward Martin*, for the plaintiffs.

Mr. *Moss*, Q. C., and Mr. *Bruce*, for the defendants.

Judgment.

SPRAGGE, C.—I incline to think, upon reading the judgment of the Court of Queen's Bench in the action at law, and the judgment of this Court, that the decree is right. If *Hooper*, the agent of the insurers, had himself been the insurer, I think the case would have been free from doubt. The letter of the 10th of August notified him of a new fact; it must be read in connection with what had gone before. On the 9th an interim insurance had been effected by the plaintiffs on their stock in No. 272 at a certain rate. On the 10th they informed *Hooper* that they had added two flats over Mr. *Williams's* store next door to their "former premises," adding, "and part of our stock is now in these new flats." What was meant evidently by "our former premises" was, the premises described in their previous application, and the added flats were additions to the former premises; and by the words "part of our stock," was meant part of the stock which was the subject

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of the previous interim assurance. There was really no room for misapprehending what was meant, and *Hooper*, acting upon this and taking the risk at an increased rate, agreed to insure the goods in the added flats upon an additional valuable consideration. It is quite clear that the policy issued was not in accordance with the altered agreement, and, if *Hooper* had been insurer, the policy would be rectified to conform to the agreement. It becomes then a question of agency, unless the company can be shewn to have had notice of the alteration in the plaintiffs' proposal for insurance. They had notice that there had been an alteration by *Hooper's* letter of the 29thof August, that the plaintiffs had cut an opening into the building adjoining on the east side. Upon this the Secretary pencilled on the application "There is an opening on the east end of the above through which communication is had with the adjoining house."

Judgment.

Hooper says he knew that part of the insured stock was removed to the added flats, and in fact *Smith* says the same. *Hooper* says after hesitation that he considered the whole was insured.

What could the Montreal office have thought was meant by what was communicated even by *Hooper* to them? It was meagre and imperfect, not according to *Hooper's* duty—but still what have they understood?

What was the duty of *Hooper*, as described by *Smith*, of the head office? Simply to receive applications, and to receive notice of changes, and of course to communicate them to the Head Office, *i. e.*. to Mr. *Smith*.

Smith's conduct in the matter was certainly not ingenuous; he says himself that he thought that the plaintiffs perhaps considered themselves insured in both buildings, and then makes what seems to be an ambigious note or memorandum on the policy. We cannot *reform* the policy unless we find that there was some-

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thing to which both parties agreed. If *Hooper* were insurer there would be no difficulty; and if we can find that *Smith* at Montreal knew what was known to *Hooper*, can we say that he, for the Company, agreed? The Company may be affected with notice of what passed between the plaintiffs and *Hooper*, but that is a different thing from an agreement.

The receipt for premium paid expresses, I believe, that the Company will do one of two things; either return the premium, or issue a policy in accordance with the application. If the application of the 9th of August, and the plaintiffs' notice to *Hooper* of the 10th, are to be read together, as I think they must be, the Company certainly did not issue a policy according to the application, and they did not return the premium. Not returning the premium and sending a policy, was it not a representation that they had accepted the application, and that the policy sent was in pursuance of it? If this be correct, are they not bound to make the representation good, if the plaintiffs were misled, as *Smith* says they were; or say the policy sent was not in accordance with the application, so no policy has been sent, *i. e.*, no effectual one, what is the effect of that? Were plaintiffs insured? It is contended they were not. I incline to think they were; and if they were, did they not continue insured until such a policy was given as they were entitled to, and such policy they have never been given yet.

Judgment.

PROUDFOOT, V. C.—The plaintiffs made their application on the 9th August, when their goods were all in No. 272, and on the 10th August gave notice to *Hooper*, the local agent of the Company, of their making the entrances into the adjoining building, 273 and the removal thither of a part of their stock. There would have been no meaning in the reference to the removed stock unless they had intended to have the

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insurance to continue upon it. And indeed the defendants admit that the plaintiffs intended to have it so continued, and that their application of the previous day was to be modified in that respect; further, it is not denied that *Hooper* knew of such intention, but it is insisted that he was not the agent of the Company for such a purpose and that his acts do not bind them. It is important to know what were his powers. The answer says, that he was only agent to receive applications and to grant interim receipts. But Mr. *Smith*, the defendants' Secretary, in his evidence shews that *Hooper's* powers were more extensive. In the opinion of the Court of Queen's Bench he "was the proper person to notify of any change, modification, or correction required to be made by the applicant in his proposal, and it was his duty to have informed his principals of it." Mr. *Smith* tells us also, that the insurance effected by the interim receipt would have been valid during its currency, although the Company might ultimately decline the risk. That being the case, what was the effect of the interim receipt when the premium for the additional risk was obtained about the 23rd September, a delay caused by the necessity of communicating with the head office? *Hooper* understood the interim receipt to cover the goods in both buildings, and that the additional rate was paid not only for the risk caused by opening the passages into 273, but upon the goods in 273, and this would apply to the time of the notice of the 10th August. If the risk were accepted by the Company on the footing of that receipt I apprehend the plaintiffs would have been entitled to a policy as extensive as the plaintiffs and *Hooper* intended it to be, *i. e.*, on the goods in 273 as well as in 272.

Judgment.

The defendants have never intimated any dissent from the terms of the interim receipt. They accepted the risk without any qualification, never led the plaintiffs to believe that their security would be less than

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they contracted for with *Hooper*. But Mr. *Smith* tells us that he caused the policy to be prepared so as in his estimation to exclude any liability for the goods in 273, though strangely enough he gives no sign to the plaintiffs of his intention. If the language of the policy properly bear this construction, as I must assume it does, since it has been so decided at law, then it is not issued in pursuance of the application. It is by mistake (to use the mildest term), other than the plaintiffs and *Hooper* intended. The application of the 9th August and notice of the 10th constitute the entire application, and the knowledge of *Hooper* was the knowledge of the defendants, for he was acting strictly within the bounds of even the limited authority ascribed to him by the defendants to receive applications, and if he failed to acquaint his principals fully, it is their misfortune, but it cannot be allowed to prejudice the plaintiffs.

Judgment.

Patterson v. *Royal Insurance Company (a)*, decides that although he did not communicate at all, the Company was bound, and the plaintiffs cannot be in a worse position when he gave only a partial or an entirely erroneous account of his engagements.

This constitutes, in my opinion, such a mutual mistake as entitles the plaintiffs to relief.

But supposing the Company not to be bound by *Hooper's* knowledge, and that the plaintiffs were alone under the impression that they had by this policy effectually insured their goods in 273, that is a case for cancelling the policy; and if the policy be cancelled, the parties are remitted to their position under the interim receipt granted by Hooper on the application of the 9th and 10th August, within the limits of

(a) 14 Gr. 169.

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his powers as admitted by the defendants, on which no policy has issued, and the loss having occurred, are entitled—following *Penly* v. *The Beacon* (*a*), *Patterson* v. *The Royal*, and many other cases in our Courts—to a decree for payment. For I think it plain that the execution of a policy vitiated by the mistake of one party so as to justify its cancellation, can never be held to be a consummation of the contract under the receipt.

The case cited of *The English and Foreign Credit Company* v. *Arduin* (*b*), is a very good example of the manner of construing contracts by letters where a term is introduced which might vary the proposal. The House of Lords there held that the mere addition of words which do not *primâ facie* import a variation will not have the effect of doing so without distinctly calling the attention of the proposer to them. This is peculiarly applicable to this case. Mr. *Smith* intended the policy to limit the liability of the Company in a way not contemplated by the plaintiffs, and which he suspected they intended, and doing so, he was bound distinctly to direct their attention to its effect.

Judgment.

Per Curiam—Decree affirmed with costs.

From this decision the defendants appealed to this Court.

Mr. *McCarthy*, Q. C., and Mr. *Bethune*, Q. C., for the appeal.

Mr. *Edward Martin*, contra.

On behalf of the appellants it was contended that the evidence shewed that there was no agreement or inten-

(*a*) 7 Gr. 130. (*b*) L. R. 5 E. & I. App. 64.

tion on the part of the appellants to issue a policy on the terms contended for by the respondents, that the policy as issued was so issued in accordance with the intention of the appellants, and that its being so issued was not through mistake on their part or through mutual mistake ; that the appellants only insured and only intended to insure the goods in the original building (S. T. 272*), and the policy issued by them only covered the goods in that building, as has been determined by the Court of Queen's Bench in their judgment as reported in 33 U. C. R. 284—that such policy was free from ambiguity, and was an intimation to the plaintiffs in plain terms of the intention of the appellants as to what goods they were insuring, and the respondents should not be allowed to take advantage of their own neglect in not reading the policy, and thus informing themselves of the extent of the risk undertaken by the appellants, and insist that the appellants should have insured the goods in S. T. 273, which the appellants never intended to insure.

Argument.

The insurance effected by the interim receipt was superseded by the issuing of the policy, and on its issue the policy alone constituted the contract between the parties, and any contract for insurance under the interim receipt was entirely put an end to by the issuing and delivery of the policy.

Here the appellants rely upon the policy as issued by them and delivered to the respondents many months before the loss by fire as expressing correctly their contract; and the respondents never dissented from the terms of that policy before the fire, and after the fire they brought an action at law thereon, seeking in such action to hold the appellants liable on such policy as it stood, and the Court have now a right to say that by

* Meaning "Special Tariff" No. 272.

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such conduct the respondents must be taken as assenting to such policy, as being in accordance with their wishes and effecting the insurance desired by them; and the respondents, who are seeking to vary the insurance effected by the policy, are bound to establish conclusively that the policy contains a contract different from that agreed upon by both parties, and this they have failed to do. The most that can be said is, that the evidence does not establish more than this, that the terms of the policy are not in accordance with the wishes and intention of the respondents; but no case is made out for varying the policy or contract of insurance so as to make it more unfavourable to the appellants, and different from the contract they intended to enter into.

Argument.

By the terms of the interim receipt the insurance effected thereby was partly in the nature of an application for insurance, and was only to be binding upon the appellants until they had an opportunity of accepting the same by the issue of a policy on the terms of such application or of declining it—that the respondents were bound to the exercise of reasonable care and caution in ascertaining that the policy was issued in accordance with such application and their intention; and a policy having been issued by the appellants in good faith and in accordance with their understanding of the application, and which in its terms is free from ambiguity, such policy became and was in fact the only contract of insurance; and that the fire having occurred several months after the delivery of such policy, and the acceptance of it as representing the true contract between the parties, the respondents, after the happening of the loss and when the appellants cannot be placed in *statu quo*, are precluded from any relief.

They also contended that the increased premium was paid to cover the increased risk or danger to the goods.

in building 272, by reason of the openings in the gable, and not because the goods to be insured were in the adjoining flats.

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Fowler v. *Scottish Equitable Insurance Co.* (*a*), *Linford* v. *Provincial Horse and Cattle Insurance Co.* (*b*), *Busby* v. *North American Life Insurance Co.* (*c*), *Ryan* v. *World Mutual Insurance Co.* (*d*), *Insurance Co.* v. *Wilkinson* (*e*), *Insurance Co.* v. *Johnson* (*f*), *Patterson* v. *Royal Insurance Co.* (*g*), *Acey* v. *Fernie* (*h*), *Weston* v. *Ewes* (*i*), *Rickman* v. *Carstairs* (*j*), *Mackenzie* v. *Coulson* (*k*), *Hendrickson* v. *Queen Insurance Co.* (*l*), *Montreal Assurance Co.* v. *McGillivray* (*m*).

For the respondents it was contended that the appellants were bound by the interim contract made by *Hooper*, who was the proper officer to receive the original application for insurance and the notification of 10th August, 1871, which together constituted the application, and to act thereon, as proved by demanding and receiving the extra premium for insuring the whole stock in both the original shop and added flats, and giving the interim receipt therefor. The acts, notice and knowledge of *Hooper*, as proved, are to be treated as the acts, notice, and knowledge of the defendants, and the contract so made through *Hooper* was never put an end to by the defendants, but on the contrary, the acts and conduct of the defendants confirmed the contract made by *Hooper*, and the appellants are estopped by the acts and conduct of *Hooper* : *Wing*

Argument.

(*a*) 4 Jur. N. S. 1169.
(*b*) 10 Jur. N. S. 1066.
(*c*) 4 Bigelow's Ins. Rep. 116.
(*d*) 4 Bigelow's Ins. Reps. 627.
(*e*) 3 Bigelow, at pp. 817–818.
(*f*) 23 Penn. Rep.
(*g*) 14 Gr. 169.
(*h*) 7 M. & W. 151.
(*i*) 1 Taunton 115.
(*j*) 5 B. & Ad. 651.
(*k*) L. R. 8 Eq. 368.
(*l*) 30 U. C. R. 108.
(*m*) 13 Moore P. C. 13.

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v. *Harvey* (*a*), *Wyld* v. *London, Liverpool & Globe* (*b*), *Penley* v. *Beacon* (*c*), *Patterson* v. *Royal Insurance Co.* (*d*), *Rossiter* v. *Trafalgar Insurance Co.* (*e*), *Davis* v. *Scottish Provincial Insurance* (*f*), *Re Universal Non-Tariff Co.* (*g*), *Columbia Insurance Co.* v. *Cooper* (*h*), *Ellison* v. *Albany Insurance Co.* (*i*), *Meadowcroft* v. *Standard Insurance Co.* (*j*). *Phillips* on Insurance, volume i., page 222, edition of 1867.

The respondents are not responsible for the neglect or mistake of *Hooper* while acting within the scope of his authority, nor for any neglect, error or omission of *Hooper* in forwarding or communicating any documents, notices, or information to the appellants or any of their servants, nor the neglect of any officer of the Company in conveying information to *Hooper* or to the respondents. Knowledge of the acts of appellants' agents, and of all acts known to them, and of their conduct, must be imputed to the appellants, and the appellants are bound

Argument.

by the knowledge and acts of their servants while acting within the scope of their authority, and the appellants are estopped, on the facts proved, from denying that the respondents were insured on the whole of their stock both in the original building and added flats: *Laidlaw* v. *London, Liverpool & Globe Co.* (*k*), *Rowe* v. *Lancashire Insurance Co.* (*l*), *Ross* v. *Commercial Union Insurance Co.* (*m*), *Patterson* v. *Royal Insurance Co.* (*n*), *Marsden* v. *City Plate Glass Co.* (*o*), *Hough* v. *City Insurance Co.* (*p*), *Peck* v. *New London Insurance Co.* (*q*), *Peckner* v. *Phœnix Insur-*

(*a*) 18 Jur. 394, S. C. 5 D. M. & G. 265.
(*b*) 33 U. C. R. 284.
(*c*) 7 Gr. 130.
(*d*) 14 Gr. 170.
(*e*) 27 Beav. 377
(*f*) 16 C. P. 176.
(*g*) L. R. 19, Eq. 500.
(*h*) 50 Penn. 331.
(*i*) 4 Lansing 53.
(*j*) 61 Penn. 81.
(*k*) 13 Gr. 377.
(*l*) 12 Gr. 311.
(*m*) 26 U. C. R. 559.
(*n*) 14 Gr. 170.
(*o*) L. R. 1 C. P. 232.
(*p*) 29 Conn. 10.
(*q*) 22 Conn. 575.

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ance Co. (*a*). The Company were bound by the terms of the interim receipt insuring the whole of the stock and could only terminate it in the way therein stated. If they desired to vary the contract as made between the respondents and *Hooper*, they were bound to intimate that fact to the respondents in clear and unequivocal language, and obtain their assent to such variation. It would be a fraud on the respondents if the appellants were allowed to introduce new terms into the agreement, while professing to accept it as proposed. The retaining the premium and sending the policy as proved, amounted to an acceptance of *Hooper's* contract. *English Foreign Credit Co.* v. *Arduin* (*b*), and the fact that the Company were bound by the interim receipt distinguishes this case from *Fowler* v. *Scottish Equitable*, and that class of cases where the agents of the Company had merely authority to receive and submit applications for insurance, but had no authority to bind the Company to any contract of insurance. *Patterson* v. *Royal Insurance Co.*, and *Rossiter* v. *Trafalgar Insurance Co.* establish this.

Argument.

If the policy, as prepared and delivered, is not in accordance with the agreement of both parties, and cannot be reformed still the appellants cannot force on the respondants a policy which they never agreed to accept; and if there has been a mutual mistake and the policy does not conform to the contract of insurance under the interim receipt, then the contract under that receipt subsists, and the appellants are liable thereunder. The policy not beeng in accordance with the previous actual agreement between the parties did not supersede the interim receipt. *Xenos* v. *Wickham* *c*.

The respondents never agreed to accept a policy on

(*a*) 6 Lansing 411. (*b*) L. R. 5, E. & I. App. 64.
(*c*) L. R. 2, E. & I. App. 296, 324.

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the stock in the original building only. They always contended that the policy covered the stock in the original building and added flats and they are not estopped from this contention by the action brought on the policy.

Druiffs v. Lord *Parker* (*a*), *Crawford* v. *Western Assurance Company* (*b*).

March 27th. DRAPER, C. J.—The defendants appealed against he decree of the Court of Chancery in this cause, which declared that "The contract of Insurance between the plaintiffs and the defendants embraced the goods situated on the flats added by the plaintiffs to the building No. 272, S. T., in the bill mentioned, and that the policy in the pleadings mentioned should be reformed so as to make the same conform to this declaration;" and it was referred to the Master to take an account of the loss of the plaintiffs in respect of goods situated on the said flats, and to tax the plaintiffs their costs of suit.

Judgment.

The defendants are sued as a corporate body and defend in that character. According to the heading of the policy put in evidence, they have offices in Liverpool and in London, and a Canada branch with the head office in Montreal. Mr. *George F. C. Smith*, who was a witness in this cause, described himself as resident secretary and chief agent of the defendants in Canada, and proved that *Frederick L. Hooper* was their agent at Hamilton; that his (*Hooper's*) duties were to receive applications for Insurance and to give interim receipts subject to confirmation by the Montreal office—if not confirmed by the Montreal office the risk was to be cancelled, and the premium returned less the amount earned by the company; his duty was to receive notices of

(*a*) L. R. 5 Eq. 131. (*b*) 23 U. C. C. P. 371.

changes in the risk, to inform the Montreal office of them, and of his action in these matters. 1876.

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The first application for an Insurance was made in July, 1871 ; the receipt given for the premium on it was cancelled because the rate was too small. On this application there was a diagram, and insurance was applied for, for one year commencing 9th August, 1871, on plaintiffs' stock of dry goods consisting chiefly of cloths and tailors' furnishings, contained in a stone building covered with S(hingles) in M(ortar), marked No. 1 in diagram, and situated on the south side of King street—the whole occupied by applicants as a dry-goods store. In consequence of the cancelling of this interim receipt a second application was made to Hooper to the same effect and he wrote to them on the 9th of August, 1871, to certify that he had received a premium of $37.50, insuring their stock with the defendants for $6,000 for one year—describing the premises as S. T., No. 272. This number related to a book called "Special Tariff," which was used for their own convenience. This premium was paid by a cheque, dated 10th August, 1871.

Judgment.

On that day *Hooper* received from the plaintiffs a notice that they had added two flats over Mr. *Williams's* store, next door to their former premises, and that part of their stock was in these new flats. *Hooper*, on receipt of this, inspected the premises and found that a door way had been cut through the brick wall in each flat, so as to connect the plaintiffs' former premises with these two flats—part of the adjoining house—which in the "Special Tariff" book was numbered 273. *Hooper* said the rate would have to be increased—that the former risk was endangered by these cuttings. On the 29th of August, 1871, *Hooper* wrote to *Smith*, the resident secretary, informing him that the plaintiffs had cut an opening into the building adjoining on the east

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side, formerly occupied by *Williams's* Canada Oil Company; that the lower portion of that building was then occupied by one *Onyon*, as a coal oil store; that he had notified the plaintiffs their rate would have to be increased to 1 per cent., and he asks, "Will you please let me know if you will accept the risk at that figure."

In reply to this Mr. *Smith* writes from Montreal on the 1st of September, 1871, in reference to the flats. "I notice the assured has cut an opening into the adjoining building on the east side, and that the lower portion of said adjoining building is occupied as a coal oil store"—and on the 26th of September he writes to *Hooper*,—"I send receipt premium $60. A note will appear on the policy that not more than two barrels of refined coal oil will be allowed to be kept in the store, but ten barrels may be placed in the yard."

Judgment.

Hooper gave a receipt to the plaintiffs after he had received their cheque, dated 23rd of September, 1871, for $22.50, which sum, with the $37.50 previously paid, made 1 per cent. on the $6,000, for which the plaintiffs desired their stock should be insured. This receipt was as follows: "$60. Received from Messrs. *Wyld & Darling*, the sum of $60, being the premium on an Insurance to the extent of $6,000 on their stock of dry goods, consisting chiefly of cloths and tailors' trimmings, all contained in a stone building on the south side of King street, Hamilton, as described in the agency order of this date for twelve months, subject to the approval of the Board of Directors, Montreal—the said party to be considered insured until the determination of said Board of Directors be notified—if approved of, a policy receipt and afterwards a policy will be delivered, or if declined, the amount received will be refunded less the premium for the time so insured. N.B.—This receipt is issued subject to all the conditions of the policy issued by the company."—Signed *F. L. Hooper*, agent.

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The plaintiffs afterwards received from *Hooper* a policy of insurance "on their stock of dry goods, consisting chiefly of cloths and tailors' trimmings contained in a building owned by one *Irwin*, and occupied by the insured as a dry goods store, situate on the south side of King street, Hamilton, Ontario, built of stone covered with shingles laid in mortar, and marked No. 1. on a diagram of the premises, endorsed on application of insured, filed in this office as No. 10995 which is their warranty and made part hereof, S. T. No. 272—Six thousand dollars. N.B.—There is an opening in the east end gable of above, through which communication is had with adjoining house which is occupied by one *Onyon*, as a coal oil store. Not more than two barrels of refined oil permitted in said store, but ten barrels of the same allowed to be kept in the yard." This policy was signed and sealed by two of the directors of the said company, and bore date 9th of August, 1871. It is expressed to be subject to the conditions and stipulations indorsed thereon, one of which is that in case any alteration or addition be made in, or to any insured building or other property * * * whether in a change of the nature of the occupation, or in any other change whatsoever by which the degree of risk is increased, and a consequent additional premium will be required, and the insured shall not have given notice thereof respectively to the said company or its agents in writing, then unless such alteration or addition be allowed by indorsement on this policy, and such increased premium be paid as may be required, such policy and insurance shall be null and void; and further, the insured removing his insured goods or other movable effects, may retain the benefit of this policy on the same, and the removal be confirmed by the company's indorsement hereon.

Judgment.

A fire took place on the 11th of March, 1872, originating in the coal oil store occupied by *Onyon*, occasion-

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ing loss to the plaintiffs' stock in trade of several thousand dollars, the goods damaged or destroyed being at the time partly in the store first occupied by the plaintiffs, and partly in the two added flats. The defendants refused to pay for the loss or damage to the latter portion; thereupon the plaintiffs brought an action in the Queen's Bench on the policy above stated, and failed on the expressed ground that the description therein did not extend to or cover goods which were in the adjoining flats added when the extra premium was paid and the policy issued, and that the plaintiffs, suing upon the policy, were bound to the description contained in it. Thereupon the plaintiffs filed this Bill.

The inquiry seems to me to be: for what purpose and intent was the increased premium paid by the plaintiffs and accepted by *Hooper* on behalf of the defendants.

Judgment.

Upon the evidence I have no doubt that on the 9th of August the plaintiffs' insurance covered only such goods as were in the store or building distinguished as No. 272.

On the following day a portion of those goods were removed into the adjoining building, which up to that time had been in the sole occupation of another person as a separate tenement. The removal was effected by making an opening in each of the two upper stories of that tenement, in fact by breaking through a brick wall and through the openings transferring the goods. The mere removal of a part of the goods would not have affected the insurance on the part remaining behind, but the making the openings in the partition wall is a very different matter. I apprehend that if, after this act done and before any notice to the defendants or their agent *Hooper*, a fire had broken out (as afterwards was the case) in the adjoining tenement, and the plaintiffs'

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stock, whether removed or remaining in No. 272, had been damaged or destroyed, they could have recovered nothing, because without any such notice they had made an alteration by which the degree of risk was increased, for considering that the adjoining building was occupied as a store by a dealer in coal oil, it cannot be denied that the breaking through the partition wall in two places would have brought the case within one of the conditions above stated. Therefore there was a necessity for dealing with the defendants, not merely because of the transfer of part of the goods insured into another building, but because the alteration of the condition of their own building, by making the two openings without any arrangement or understanding with the defendants, vitiated the Insurance they held, and this I at first thought was passing through *Hooper's* mind when he inspected the premises and told the plaintiff *Darling* that the former risk was endangered by these cuttings and that their rate would have to be increased; that he would have to satisfy* the head office and that they would have to settle what the extra rate would be.

Judgment.

However, on this same 10th of August, the plaintiffs wrote to *Hooper* in these words, "We beg to advise you that we have added two flats over *Williams's* store, next door to our former premises, and that part of our stock is now in these new flats."

From the letter of Secretary *Smith*, of the 1st of September, 1871, to *Hooper*, it appears that at that date they had come to no conclusion whether they (the defendants) would continue the risk, or at what rate, but on the 26th of that month *Smith* sends the receipt for the whole premium—*i.e.*, that originally paid, and the additional $22.50, and then the policy is sent up ante-

* The word in the printed evidence of *Hooper* is *satisfy*; it is probably a misprint, as *notify* is the more likely word to have been made use of.—Rep.

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dated to the 9th of August, as if the Insurance had been effected on the application of that date; and the question is reduced to this, whether considering *Hooper's* position as the defendants' agent, his own account of the transaction and the other evidence, he contracted to insure the plaintiffs' stock, not as expressed in the policy which is (except as to the amount of premium) based upon the application made when the plaintiffs occupied only the one store, but on their stock of goods, under the changed circumstances, viz.—the addition of the two flats—the openings communicating into them—and placing therein a part of the stock which had been insured as being in No. 272.

Now I am of opinion that *Hooper* being fully acquainted with the altered state of the buildings and the removal of part of the goods already insured into the added flats—having been told, as the plaintiff *Darling* swears, that the plaintiffs wanted all their goods insured —that "under any circumstances they must have the stock insured"—having admitted after close pressure in examination that he "certainly thought all the goods were insured"—that he told Mr. *Ball* (another employee of the defendants) that he "considered the policy insured both buildings,"—did give the interim receipt for $60, as already set out, and intended to accept the plaintiffs' application for insurance on all their stock in their new and old premises.

Judgment.

Hooper's authority to bind the defendants to this extent is recognized in the following passage of Mr. *Smith's* evidence, "If Mr. *Hooper* had deliberately insured the goods in these buildings as one risk, it would have been binding so long as this receipt is in force, that is until the receipt is cancelled in some way or other. The risk is binding, notwithstanding it is in violation of our standing rule as to splitting up risks."

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Now the policy, afterwards sent up from Montreal, has been held by the Court of Queen's Bench not to cover goods in the added flats. As at present advised, I agree in that view. It certainly cannot be set up on the part of the defendants as a rejection of the application of the plaintiffs to *Hooper* on the 10th of August. And then it seems to me, on a consideration of the whole evidence, that we should hold that the receipt given by *Hooper* continued in force to the time of the fire.

I feel confirmed in this conclusion by a reperusal of Mr. *Smith's* evidence, in which after referring to *Hooper's* letter of the 29th of August, informing him of the cutting of the openings into the adjoining building, he states : " I gave instructions for the preparation of the policy—this was part of my duty. The pencil memo. on paper A, beginning ' N.B.,' and the rate to be fixed are made by me. I made the memo. which begins ' N.B.,' for the express purpose of making it perfectly distinct and confining the risk to the house there mentioned." Further on he says, " I thought that there might have been an Insurance on the goods in the building and that the plaintiffs might at the same time not be insured in regard to the stock in the other building. I framed the policy so as to cover only the stock in the one building. I wanted to make this sure. I remember distinctly, to make it perfectly plain, thinking that the plaintiffs might perhaps think the goods in both buildings were being covered, I made this pencil memo. I did not inform *Hooper* as to this, I only sent him the policy. I did not tell him the effect of the policy, nor my intention in making the memo."

Judgment.

This " memo." is, as shewn in the appeal book, a copy of a diagram, drawn on another application (for policy 1,377,249, which is not the number of the policy issued in the present case) and in this diagram the

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houses are numbered as in the book called "Special Tariff." This evidence establishes that for whatever reason, Mr. *Smith* apprehended that the plaintiffs might believe that this assurance would cover all their stock in both buildings, and that he framed the policy so as to prevent this, and in pursuance of the same object makes the memo. in pencil on the plaintiffs' application of 9th August, which application I presume remained in his own hands, and would not afford any information to the plaintiffs. Mr. *Smith*, as he states, did not inform *Hooper* of this, or make any communication direct or indirect respecting it to the plaintiffs, so as to apprize them that he was virtually rejecting what they intended to obtain, namely, an insurance to the extent of $6,000 on their stock in their original and additional flats. In other words, thinking that the plaintiffs might have intended the insurance to cover the whole stock, (as it is plain they did intend) he frames the contract so as to defeat that intention, but does not inform them that he had so framed it, and leaves them to find it out by an examination of the policy, which, though executed in September is dated on the 9th of August, the day before the plaintiffs notified *Hooper* that they had added the two flats next door to their former premises. If Mr. *Smith* thought it necessary specially to protect the Insurance Company against a future possible misunderstanding, good faith and upright dealing should have induced him to inform the plaintiffs fully on the matter.

Judgment.

I have examined the numerous authorities referred to, but I have only found three of them which materially bear upon the case. *Wing* v. *Harvey* (*a*), *Patterson* v. *The Royal Insurance Company* (*b*), and *Fowler* v. *The Scottish Equitable Assurance Society* (*c*). On them, as applied to the evidence in this case, I found these conclusions: *Hooper* had authority to bind the defendants

(*a*) 18 Jur. 394, 5 DeG., M. & G. 265. (*b*) 14 Grant. 170.
(*c*) 4 Jur. N. S. 1169.

by an interim receipt. The defendants had power, either by issuing a proper policy or by refusing the application, to put an end to the contract as made by *Hooper*; but until they did so, that contract was binding and remained in force until the fire. 1876. Wyld v. The Liverpool, &c., Ins. Co.

I think the appeal should be dismissed with costs.

HAGARTY, C. J.—It seems very clear that, at all events up to the issuing of the policy, the plaintiffs were insured on their stock in both buildings.

Mr. *Smith* expressly concedes this in his evidence at page 20. "The plaintiffs were certainly insured up to 23rd of September." This was the date of their paying the extra premium and the date of *Hooper's* letter to Montreal asking for the policy, "as the extra has been paid."

It does not clearly appear what was the date at which the policy was actually executed by the defendants. It bears date August 9th, being the date of the receipt which was ante-dated back to that date by *Hooper*, though not in fact given till September 23rd, when the extra premium was paid. Judgment.

This receipt describes the stock as "all contained in a stone building on the south side of King Street, Hamilton, as described in the agency order of this date." This agency order is explained by Mr. *Smith* (p. 20) as being the application signed by the plaintiffs.

This application, which contains the first rate of premium states the stock to be contained in a stone building covered with shingles in mortar. Marked No. 1, in diagram.

Then, on 10th August, the plaintiffs wrote to *Hooper* —"*We have added two flats over Williams's store* and part of our stock is in these new flats."

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Hooper inspects the premises and has the fullest knowledge of the facts stated in this letter, though, as it appears, in writing to his principals he only tells them of the openings having been cut, and describes how the lower part of the store was occupied.

Then the plaintiffs pay an extra premium expressly for the extra risk, and the principals receive this extra sum, knowing it to be paid for extra risk.

I entertain no doubt whatever that there was then a complete contract binding on the Company in the sense understood by the plaintiffs.

If I have been successful in catching Mr. *Smith's* meaning, he does not dispute liability until the issuing of the policy, which in his view restricts their liability to the goods in one tenement.

Judgment.

His evidence is very singular (page 20) as to his own views in framing the policy: "I framed the policy so as to cover only the stock in the one building—I wanted to make this sure, I remember distinctly, to make it perfectly plain, thinking *that the plaintiffs might, perhaps, think the goods in both buildings were being covered.*" (Here we may pause to ask, how did Mr. *Smith* acquire the knowledge of the plaintiffs having any of the goods in the second building?) He proceeds, "*I did not inform Hooper as to this. I only sent him the policy. I did not tell him the effect of the policy, nor my intention in making the memorandum.*"

We may presume that this witness satisfied himself as to the propriety of this course—aware, as he must be assumed to be, of the trite maxim as to the perfect good faith that ought to govern insurance dealings; but he can hardly be surprised if those who stand impar-

tially between the parties, regard it as not in accordance with their ideas of right and wrong. 1876.

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If he thought the plaintiffs might have believed that they were so insured, the straight-forward course was, to at once notify them to the contrary. Knowing the probability of their holding this view, he prepares the policy as he thinks to prevent their having the benefit of it.

In a very instructive case of *Smith* v. *Hughes* (*a*), Sir Colin *Blackburn* says :—"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters upon that contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." And Sir *J. Hannen*, at page 610, says :—"The rule of law is a corollary from the rule of morality which Mr. *Pollock* cited from *Paley*, '*That a promise is to be performed in that sense in which the promiser apprehended at the time the promisee received it.*' And may be thus expressed, 'The promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it.'" Judgment.

I am unprepared to assent to the argument that even if the plaintiffs had read the policy when ultimately sent to them they must be held to assent to the construction of the bargain urged by the defendants.

They would see an instrument on its face dated as speaking on 9th August.

They would know that they had given written notice

(*a*) L. R., 6 Q. B. 607.

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of the change in the occupation, and that the Company's agent had fully examined the true state of the case, that the openings into the adjoining store were noticed, and that they had paid an extra sum for the extra risk, and they might not unreasonably feel satisfied that the instrument sent to them embodied the true bargain.

The plaintiffs never signed or expressly assented to the document which defendants insist is the binding contract between them ; but it is insisted that having legal, if not actual, notice of its provisions, they are bound by it—as they did not return or repudiate it, but kept it from the end of September to the fire in March.

I think, had I been the Judge trying the action at law, I should have probably adopted the view of the learned Queen's Counsel who presided, in substance receiving evidence of all the surrounding circumstances —not to vary the written contract, but to ascertain what was the subject matter of the insurance therein described, and leaving it as he did to the jury. "Did the two additional flats at the time the policy was issued form part of the premises occupied by the plaintiffs as their dry goods store, and were they at that time used as part of, and did they then form part of the building mentioned in the policy?"

Judgment.

I have read with interest the instructive judgment of my Brother *Wilson* in the Court below, where he collects the authorities.

He seems to think there would be no difficulty but for the words "and marked No. 1, on a diagram of the premises indorsed on application of insured and fyled," &c., &c.

I do not feel so much pressed by the apparent difficulty created by these words. Some of the authorities

collected by my learned brother I think might shew such a difficulty not to be insurmountable. 1876. Wyld v. The Liverpool, &c., Ins. Co.

As to receiving evidence of what is the subject matter mentioned in the contract, in addition to the cases cited, we may refer to *Macdonald* v. *Longbottom* (*a*), *Newell* v. *Radford* (*b*).

But even adopting the construction placed on the policy by the Queen's Bench, we were not pressed by their difficulty in dealing with an action expressly brought on such policy.

In the case before us we can, if necessary, come to the conclusion that the true contract is not what is expressed in that policy, but was in truth that which the plaintiffs insist they made with the Company through their agents.

I think that it is not technically necessary to direct a reformation of the contract where nothing remains to be done under it, but that the decree may be for payment, the amount to be ascertained in the manner directed, and that the appeal be dismissed with costs. Judgment.

PATTERSON, J.—I think the plaintiffs have a clear right to recover on the contract made through *Hooper*, the agent of the defendants. This right is probably a legal right; but under our present law, that is no objection to its enforcement by the Court of Chancery.

Hooper undoubtedly had authority to make contracts of insurance on behalf of the defendants to the effect set out in the receipt given by him to the plaintiffs which bears date 9th August, 1871, although it was not given until after that date. It is given upon a printed form,

(*a*) 1 El. & El. 977. (*b*) L. R. 3 C. P. 54.

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supplied by the defendants. *Hooper's* authority to give receipts of this nature is stated by the defendants in their answer, and expressly stated in evidence by Mr. *Smith*, their resident secretary at Montreal.

Let us see what was done by *Hooper*. On 9th August the plaintiffs signed an application for insurance in the sum of $6,000, for one year, commencing on 9th August, 1871, on their stock of goods, which they describe as being contained in a building on the south side of King street, Hamilton, the whole of which was occupied by them as a dry goods store. In this application they say, in answer to a question respecting the nearest building on the south side : "See diagram on Pol. 1,377,249, expired."

This application was accepted by *Hooper*, and on 10th August, the plaintiffs paid him $37.50 being the premium at 62½ cents per $100, and received from him a receipt which *Hooper* says was similar in its form to the one afterwards substituted.

Judgment.

On 10th August, the plaintiffs made an opening from their premises through a brick party wall into each of the two upper flats of an adjoining house, thus adding those flats to their premises, and removed part of their stock into the added flats. By doing this they increased the risk, as the lower part of the adjoining house was occupied as a coal oil store, and they clearly vitiated their insurance, and were for the time uninsured.

They then promptly gave a written notice to *Hooper* that they had added the two flats and had removed part of their goods into them ; and, upon receiving this notice, he visited and inspected the premises and told them that their rate of insurance must be increased.

Some correspondence then took place between *Hooper*

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and Mr. *Smith*, respecting the rate at which the risk was to be taken, the quantity of oil to be kept in the oil store and yard, &c. In this correspondence *Hooper* informed Mr. *Smith*, that the plaintiffs had opened the communication with the adjoining building—but does not appear to have expressly mentioned that they were occupying a portion of it with their goods, or to have sent to Montreal the plaintiffs' notice of 10th August, or any copy of it. The plaintiffs, however, were no parties to this correspondence, and there is nothing to shew that they knew anything more of it, than that it was to settle the rate of premium which they were to pay.

The result, as far as the plaintiffs were concerned, was that when *Hooper* was satisfied that one per cent. was to be the rate charged, he effected a new interim insurance with the plaintiffs. They paid him on 23rd September the difference between the $37.50, formerly paid, and $60, or one per cent. on $6,000, and he gave them the receipt in question, dating it 9th August.

Judgment.

This is the document which, in my opinion, states the contract between the parties.

It reads thus: "Received from Messrs. *Wyld & Darling* the sum of $60, being the premium on an insurance to the extent of $6,000 on their stock of dry goods, consisting chiefly of cloths and tailors' trimmings, all contained in a stone building on the south side of King street, Hamilton, as described in the agency order of this date, for twelve months; subject to the approval of the Board of Directors, Montreal, the said party to be considered insured until the determination of the said Board of Directors be notified—if approved of, a policy receipt, and afterwards a policy, will be delivered; or, if declined, the amount received will be refunded, less the premium for the time so insured."

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This was given by *Hooper* under his general authority as agent, not under any special instructions with reference to this as an altered risk. It effected an assurance where none existed—as although this risk is dated back to 9th August, though only assumed on 23rd September, it cannot be supposed that if a fire had occurred before 23rd September the defendants would have so readily conceded that the original insurance had any remaining effect, particularly as by a note at the foot of the receipt, the interim insurance is made subject to the conditions of the Company's policy, No. 2 of which would, under these circumstances, have enabled them to treat it as void.

Mr. *Smith*, in his evidence, states the same view of this receipt. He says, "If Mr. *Hooper* had insured deliberately the goods in these buildings as one risk, it would have been binding so long as this receipt is in force, that is, until the receipt is cancelled in some way or other. The risk is binding notwithstanding it is in violation of our standing rule as to splitting up risks."

Judgment.

The important inquiry is, what did *Hooper* insure? Was it the stock of goods in whatever part of the whole premises, or only that part of the stock which remained in the original building?

I think it was clearly the former. The application was to insure the whole stock. The subject matter of the insurance was the stock, and no change had been made in that. The only change was in the place which contained it. The general description of the building, contained in the original application, was as applicable to the enlarged premises as to the original ones, viz:—"A building on the south side of King street." The notice of the 10th August informed the agent that that description then applied to the extended premises; the agent went there and saw that the stock which he was asked

to insure was partly in the added rooms : when he gave the receipt on 23rd September, insuring "their stock of dry goods," he correctly described the whole premises, by the words, "in a stone building on the south side of King street." (The words "as described in the agency order of this date" had no meaning, as Mr. *Smith* and Mr. *Hooper* both state that agency orders had not been in use for some years, although they still used the printed forms of receipts which contained those words), and Mr. *Hooper* states in his evidence, in corroboration of the other evidence given by the plaintiffs, and in accordance with what must obviously have been the case, that it was understood and intended that the insurance was to be on the stock, whether in one part of the premises or the other.

Having thus reached the conclusion which seems to me the only one possible, that immediately after the receipt was given by *Hooper*, the plaintiffs were insured on their whole stock—we have to inquire how has that position been changed. Judgment.

We have to look at the contract itself. By it the plaintiffs were to be considered insured until notified of the determination of the Board of Directors at Montreal —if approved, a policy was to be delivered—if declined the premium was to be returned, less a proportionate part.

A policy was delivered, but it has been decided by the Court of Queen's Bench that it was not in approval or ratification of the contract, because, instead of applying to goods in the whole "building on the south side of King street," it was limited to the original building by a reference to a diagram which Mr. *Smith* had drawn upon the application paper, and to No. 272 which the insurance companies used to designate the risk on the original building only.

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Then did the Board of Directors determine to decline the risk? From Mr. *Smith's* evidence it appears that the subject was never before any board for determination. Whatever was done was done by Mr. *Smith* himself. He says his duty and his authority made it proper that he should do all that was done; and there is no reason or occasion to question his power, as between him and his employers, to act for them in the fullest manner. The question here is, not what the insurance company authorized Mr. *Smith* to do, but what this contract makes essential to put an end to the insurance under it.

If we assume, however, that the "Board of Directors" mean Mr. *Smith*, the secretary, does it appear that he declined the risk? To hold that he did would be to disregard the plain effect of the evidence given by Mr. *Smith* himself. He shewed clearly that he had no intention to decline, but on the contrary, that his intention was to accept the risk, as he understood it from *Hooper's* reports.

Judgment.

The correspondence which is in evidence has an appearance of confusion, which makes one scarcely wonder at the existence of misunderstanding. I have already noticed that *Hooper* omitted to transmit the notice given him on 10th August, but merely wrote an imperfect statement of the facts. It is now of importance to notice that he does not seem to have communicated the fact that on the 25th September he had given the receipt now in question or to have informed Mr. *Smith* of the terms in which he had effected the interim insurance, or even of the fact that part of the stock was in the added premises. He merely advised him of the receipt of the extra premium, upon which Mr. *Smith* sent him a policy receipt, which seems not to have reached the plaintiffs, and afterwards sent the policy. Beyond all question Mr. *Smith* never declined or meant

to decline the risk, as he understood it to have been taken. It is scarcely necessary to say that he cannot be said to have declined the risk really taken by the agent, as it was not reported to him.

By the very terms of the contract, therefore, the insurance continued. If it ceased, it must have been by some means not provided for in the contract.

Before considering the further contention on this point, I may say, that while in the face of Mr. *Smith's* own evidence, it cannot be argued for the defendants that Mr. *Smith* declined the risk taken by *Hooper*, there is quite room enough to argue, as it has been argued with much force, that *Hooper's* communications did substantially convey the information that the added premises were designed for occupation by the plaintiffs in their business, and that the stock which was to be insured was not to be confined to any one part of the premises; that, in short, this was the only reasonable understanding of the information which he gave; and that to suppose that he merely meant to give the information that the old premises had been made more hazardous would be opposed both to what one would expect a business man to think, and to what Mr. *Smith* himself may easily be supposed to have thought, as he tells us he did think of goods being in both buildings, and guarded against wording the policy so as to cover both. If it were found as a matter of fact, that *Hooper* did in substance communicate and that *Smith* understood the real effect of the application and interim contract, the result would be, as *Smith* shews, that he intended to ratify what *Hooper* had communicated, and as he in fact issued a policy which came short of doing that, the policy ought to be rectified. A proper case would, on such facts as these, appear for relief of that character.

Judgment.

I am not prepared, however, to hold that merely

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because the contract made by *Hooper* covered the whole premises we can make the policy also cover them; because the contract was not that such a policy should issue, but it gave the directors the option to approve or decline the risk, the interim insurance subsisting until one thing or the other had been done.

I have now to notice the contention that because the policy was issued, and was delivered to and retained by the plaintiffs, their remedy is confined to it, and that they cannot fall back on the original contract.

The chief difficulty in dealing with this branch of the case is in apprehending on what principle the contention is founded.

If the policy had been in affirmance of the contract, it would have, of course, superseded the contract. This would not be by way of merger, for the policy is not the deed of the defendants, and apparently need not be their deed, as there is nothing before us to indicate that the defendants are a corporation, but the circumstance that they are sued in a *quasi* corporate name, as seems to be usual here and in the United States. It would be because by the terms of the contract it was to cease if the risk was approved and more formally assumed by a policy.

Judgment.

The decision in the Queen's Bench shews that that event did not happen.

Then if the issue of this policy does not, under the terms of the contract, supersede the contract, I apprehend it can only do so in case the parties agreed that it should do so. Such an agreement must be shewn as a matter of fact, and may be supported by evidence of an express consent to the substitution of the one contract for the other; or of the delivery of it on the one side

and acceptance on the other ; or of such conduct of the plaintiffs as should estop them from denying that they have accepted it in substitution.

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The evidence falls far short of establishing any one of these positions. It amounts merely to this, that the defendants' secretary sent the policy to the plaintiffs, and they kept it. Without explanation this would doubtless be *primâ facie* evidence of acceptance, but there is the explanation given that the plaintiffs received and retained and even brought an action upon the policy, in the belief that it was that for which they had stipulated. This conclusively negatives any actual agreement to forego the wider insurance and accept this policy in its place. Then it is urged that the attention of the plaintiffs was called to the contents of the policy by an indorsed request to read the policy, and return it immediately if any alteration was necessary ; and that they either did read it or ought to have read it ; and that if they had then objected and returned the policy, the defendants would have had an opportunity of declining the wider risk, which now that a fire has occurred they cannot do.

Judgment.

The contention is specious only at first sight :—

(1.) It assumes a right to cast on the plaintiffs that which was the duty of *Hooper*, their own agent, viz., to give their secretary notice of the terms of the contract which he had made. (2.) It requires us to assume that by reading the policy the plaintiffs must have known or ought, with reasonable intelligence, to have understood that their whole premises were not covered. This assumption I should be very unwilling to make. I am not satisfied that a different construction from that arrived at by the Court of Queen's Bench might not with perfect honesty have been put upon the wording of the policy, by persons whose attention was not so particu-

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larly called to the strict effect of the terms employed, and I am satisfied that having regard to the circumstances that the plaintiffs were looking for a policy agreeing with and not one differing from their existing contract, that their attention was not in any way called to the likelihood of an alteration ; that they were in no way put on their guard or led to look for anything but one of the two things stipulated for, viz., a policy ratifying, or a notice declining ; that the general terms used in describing their premises were the same as those used in the contract ; and were, as held in the Queen's Bench, appropriate to the extended premises, being limited only by references to data in the possession of the defendants, and which reference conveyed no definite meaning to the plaintiffs ; and that Mr. *Smith*, while he says that he added the clause " N.B.—There is an opening in the east end gable of above, through which communication is had with the adjoining house which is occupied by one *Onyon* as a coal oil store : Not more than two barrels of refined coal oil permitted in said store, but ten barrels of the same allowed to be kept in the yard"—so as to make it perfectly plain that only the one building was covered, shews by the same statement that in his judgment the descriptive words would not necessarily be read as confined to the one building ; and yet in place of saying in plain terms that the insurance was so confined, he adds this clause, which is more likely to be read as referring only to the danger from the stock of coal oil than as qualifying the previous clause with which it has no ostensible connection, and then forwards the policy without even calling the agent's attention to this ambiguous paragraph. It would be most unreasonable to hold, whether the plaintiffs read or did not read the policy, that they are chargeable with such negligence as to give the defendants the right to say that they must be taken to have accepted the policy; and (3.) a very important requisite of estoppel is wanting, viz., evidence that the conduct of the plaintiffs

Judgment.

has induced the defendants in any way to alter their position. 1876.

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We must not lose sight of the fact that there was an existing definite contract. The parties were not negotiating. The policy was not sent by way of a proposal which the plaintiffs were to accept or refuse. The insurance was to continue under the existing contract unless it was replaced by a policy of similar effect or declined. Instead of doing either of these things the defendants chose to do something different from both. If they desired to terminate their liability under the contract, there was a stipulated way to do that. They had only to give a notice and it was done. It might have been done without in the least affecting their right to make whatever new proposition they desired to make for an insurance of a different nature. They do not now say that they made such a proposition, and while waiting for an answer, had deferred giving the notice, or anything to that effect. Their position merely is, that their own servants or agents having failed to keep each other informed of what they did, a step was taken which was probably not quite what would have been done if more accurate information had been given by the local agent to the secretary ; and that this inadvertence might have been remedied if the plaintiffs had found it out and told them of it. The complaint really is, not that any new liability was created or any existing liability continued at the instance of the plaintiffs, but that the plaintiffs, who had no duty in the matter, did not supply the default of the agent in the performance of his duty.

Judgment.

The questions involved in this case are chiefly questions of fact, and have to be decided without much assistance from authority. One case which has been cited, however, very much resembles the present on the question as to the effect of the policy : *Fowler* v. *The*

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Scottish Equitable Life Insurance Society (*a*), decided by Sir *J. Stuart*, V. C., in 1858. In that case a negociation for a life policy had taken place in London with the agent of the company, and the terms of insurance were agreed upon, but a policy had to be issued from the head office at Edinburgh. By a mistake, the agreed terms were incorrectly reported to the head office. The policy correctly followed the agreement as reported, but not the real agreement which had been made. The policy was received by the insured, who did not read it or discover the mistake, but paid premiums on it for some years, until the death of the person on whose life the risk had been taken, and he then brought an action at law upon the policy, when it was found that the insurance had been vitiated by an act of the deceased, which would have been permitted by the policy if it had followed the original agreement. The bill was filed to reform the policy. It was held that it could not be reformed because the agreement did not bind the company to issue a policy, but left the directors at liberty to accept or reject the proposal ; but that as the policy was not according to the agreement, it was not binding on either party. The London agreement in that case was not in itself operative as an insurance, and, therefore, the company was ordered to refund all the premiums paid upon the policy. In the case before us, the policy being inoperative on the same grounds as in the case cited, the original contract is left to operate.

Judgment.

The plaintiffs succeed upon the principle acted upon in *Patterson* v. *The Royal Insurance Co.* (*b*), and the cases which have followed that decision.

I think the appeal should be dismissed with costs. But if the appellants desire to have the decree varied by striking out the words " and that the policy in the

(*a*) 3 Jur. N. S., at p. 1169, and 28 L. J. Chy. at p. 225.
(*b*) 14 Grant 169.

pleadings mentioned should be reformed so as to make the same conform to this declaration, and doth order and decree the same accordingly," that variation will, in my opinion, be proper.

HARRISON, C. J.—The prayer of the bill is as follows:

1. That the contract may be performed, and the policy dated 9th August, 1871, may be amended by inserting therein appropriate words shewing that the policy is intended to extend to and cover the stock of the plaintiffs contained in the original store and the two upper stories of the adjoining building added thereto, and that the defendants may be restrained by order and injunction from pleading in the action at law, or urging at the trial thereof, that the said policy covers only that portion of the plaintiffs' stock contained in the original store.

2. That the defendants may be ordered and directed by order and injunction to take the necessary proceedings in the action to strike out their pleas raising the defence, and to pay the plaintiffs their loss in the premises. Judgment.

3. That the defendants may be ordered to pay the costs of this suit, and of so much of the said action as was incurred by the raising the said defences and of and incidental thereto.

4. And for such further and other relief, &c.

The decree appealed against is as follows:—

1. The Court doth declare that the contract of insurance between the plaintiffs and the defendants embraced the goods situated in the flats added by the plaintiffs to the building, S. T. No. 272, in the bill mentioned, and

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that the policy in the pleadings mentioned should be reformed so as to make the same conform to this declaration.

2. That it be referred to the Master to take an account of the loss of the plaintiffs in respect of the goods situated on the said flats and to tax the plaintiffs' costs of this suit.

3. That the defendants do pay the amount of the loss when ascertained by the Master, one month after the Master shall have made his report, and that the defendants do pay to the plaintiffs their costs forthwith, &c.

Judgment.

It seems to me on the evidence that the plaintiffs intended to insure their whole stock including the portion in the added premises; that *Hooper*, the agent of the defendants, was informed of their intention; that he afterwards, knowing of their intention, inspected the premises and gave the plaintiffs to understand that an additional premium would be required; that *Hooper* did not fully report the facts to the defendants; that the extra premium was afterwards paid by the plaintiffs for the purpose of insuring the stock as well in the added as in the old premises; that the premium was received by the agent upon this footing; that the plaintiffs were insured by *Hooper* on this footing; that the defendants' have never decided whether the insurance on this footing shall continue or be cancelled; and that the policy does not clearly express the interim obligation which *Hooper* undertook for the defendants.

If *Hooper* were himself the underwriter, he would not be allowed to contend that the insurance did not cover the whole stock in both buildings. His attempt to do so would, on the facts proved, be an attempt to commit a fraud on the plaintiffs by receiving their money under

pretence that the whole stock was insured and afterwards, without returning the money, and after loss and no possibility of insuring elsewhere, to repudiate the weight of the obligation.

He was the agent of the defendants, authorized to solicit risks and grant interim insurances. Mr. *Smith*, speaking of his powers, says, "If Mr. *Hooper* had insured deliberately the goods in these buildings as one risk it would have been binding so long as this receipt was in force, that is until the receipt is cancelled in some other way; the risk is binding notwithstanding it is in violation of our standing rule as to splitting up risks."

I think, on the evidence that *Hooper* did deliberately insure the goods in both buildings as one risk, that this insurance was binding on the defendants until cancelled, and that it does not appear ever to have been cancelled, and certainly was not cancelled before the fire.

Judgment.

It appears to me that the case may fairly be held to come within the principle of the cases of *Penley* v. *The Beacon Assurance Company* (*a*), and *Patterson* v. *The Royal Insurance Company* (*b*), and that, if deemed advisable, the Court may order the payment of the insurance money without directing the reformation of the policy.

The only object of ordering the policy to be reformed would be to enable the plaintiffs to recover, notwithstanding the inequitable and unjust defence which so far has succeeded in the Court of Law. The object of the plaintiffs in the Court of Law is to recover the insurance money on the whole of their stock. That object can just as well and with much less expense be attained

(*a*) 7 Gr. 130. (*b*) 14 Gr. 169.

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by directly ordering the defendants to pay the money in pursuance of the real contract made between their agent and the plaintiffs, a contract which was binding on the defendants when made, and binding at the time of the loss.

The language of the late Chancellor *VanKoughnet* in *Patterson* v. *The Royal Insurance Co.*, is very pertinent here. He says: "The evidence of the manager shews that the agents were authorized to issue these receipts, and that the company had always treated them as creating insurances till they were disapproved by the manager. I should, I think, hold that by means of this receipt and the payment of the money which it acknowledges, an insurance was effected binding on the Company, and that it continued to be binding up to and at the time of the fire, no rejection of it having taken place in the meantime. The Company, it is true, had no opportunity to reject, because their agent had never informed the manager of the risk, *but they, not the plaintiff, must suffer by his neglect or fraud.*"

Judgment.

So here I say that the Company, not the insured, must suffer by the neglect or fraud of their agent. I cannot say that *Hooper* was really guilty of any designed fraud, but I cannot help saying on the evidence that he was in this transaction guilty of neglect, which has been the real cause of all the litigation and trouble that has since arisen between the parties.

It is much better in such a case, even for Insurance Companies themselves, that they and not the insured should be the sufferers. The consequence will be that they will be more careful in the selection of their agents, and that their agents will be more careful in the discharge of their duties, See *Keith et al.* v. *The*

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Globe Insurance Company (*a*). See also *May* v. *The Buckeye Mutual Insurance Company* (*b*), *Etna Live Stock Erie Insurance Company* v. *Olmstead* (*c*), *Commercial Insurance Company* v. *Spankreble* (*d*), *Miller* v. *The Mutual Benefit Life Insurance Company* (*e*), *The Dayton Insurance Company* v. *Kelly* (*f*).

It is argued that the plaintiffs ought to have examined their policy and had it rectified by the defendants if necessary within a reasonable time, and that not having done so, the plaintiffs are now too late to object to its form.

This argument assumes two things, viz. : (1.) That the language of the policy is so clear that the necessity for correction was apparent, and (2.) That the insurance company in the event of a loss would repudiate the deliberate acts of their own agent.

As to the first I am unable to say that the language of the policy is clear. Judgment.

Lord *Chelmsford*, in Earl *Beauchamp* v. *Winn* (*g*), in dealing with a similar argument, said " And it may be remarked if a reference were made to the neglected document, the knowledge which it would have imparted would have been of a grant of doubtful construction. * * * With regard to the objection that the mistake (if any) was one of law, and that the rule '*Ignorantia juris neminem excusant*' applies—I would observe, upon the peculiarity of this case that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from ignorance of a well-known rule of law—

(*a*) 52 Ill, 518.
(*b*) 3 Am. 76, 82.
(*c*) 4 Am. 483, 486.
(*d*) 4 Am. 582, 584.
(*e*) 7 Am. 122, 126.
(*f*) 15 Am. 612, 617.
(*g*) L. R. 6 H. L., at p. 234.

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and there are many cases to be found in which equity upon a mere mistake of the law without the admixture of other circumstances has given relief to a party who has dealt with his property under the influence of such a mistake. Therefore, although, when a certain construction has been put by a Court of Law on a deed, it must be taken that the legal construction was clear, yet the ignorance *before* the decision of what was the true construction, cannot, in my opinion, be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant must be construed."

As to the second, I am unable to say that it was the duty of the plaintiffs to presume that the insurance company or their agent would, in the event of loss, act otherwise than in accordance with the obligation contracted when the premium was paid to the agent.

Judgment.

I do not think that it is open to the defendants as a reputable company having reputable agents, in the absence of express contract to that effect, to insist that persons doing business with them or their agents should, at the peril of losing their rights, have anticipated and provided against conduct that would not be in strict accordance with honesty and fair dealing either on their own part or on the part of their agents.

I am not of opinion in this case that there was such wilful ignorance or culpable neglect as to deprive the plaintiffs of their right to equitable relief if entitled to it upon any ground.

I see no object, after the loss and after liability incurred, in directing the policy to be reformed merely as a means to attain an end which may be attained, directly attained, without such means.

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In *Luce* v. *Izod* (*a*), in an action at law on a covenant binding the defendant not to practice at S., the Court allowed an equitable plea that as between the plaintiff and the defendant, the part of S. in which the defendant practised, had always been treated as being in S. M., and that it was not intended by the parties to restrain the defendants from practising in the part of S. in question, and that the covenant as set forth in the declaration was so framed by mistake, *striking out so much of the plea as alleged that the deed ought to be re-formed.* See further, the cases cited, *Shier* v. *Shier* (*b*), and *Brown* v. *Blackwell* (*c*).

The power of the Court of Equity to restrain a defendant from setting up an inequitable defence at law, whatever its origin may have been, cannot now be seriously doubted. By the exercise of this power Courts of Equity have for a long time indirectly enabled plaintiffs at law to recover their just demands. It is now desirable that Courts of Law and Equity should in as many cases as possible directly do that which they have hitherto had power indirectly to do in the administration of justice.

Judgment.

It is in this spirit that the Court of Equity in this Province, where a party is insured, although no policy has been issued, instead of going through the form of directing the Company to issue a policy, which would enable the party to sue at law and recover the amount of his loss, directly orders the insurers to pay the amount of the loss.

So where the party asking for relief is insured and the policy issued cannot be actually said to be the contract of insurance which he made, I do not see why the Court should not at once direct the Company to pay the

(*a*) 1 H. & N. 245. (*b*) 22 U. C. C. P. 147.
(*c*) 35 U. C. R. 239.

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loss instead of directing the policy to be reformed, so as in an action at law to recover the amount of the loss.

In re De La Touche's Settlement (*a*), where by mistake in pencil directions given to a stationer, a clause of a sentence was inserted in a marriage settlement, which on the face of the deed was repugnant to the sense, and which led to a highly improbable result—although the fact of the mistake was not admitted by both parties—the Court on petition under the Trust Relief Act did not order the settlement to be rectified, but prefacing the order with a declaration, that it appeared that the words in question were inserted by mistake, made an order for distribution of the fund *as if the clause had not been inserted.*

In *Cooper* v. *Phibbs* (*b*), on a petition to cancel an agreement for the hiring of property, the whole facts fully appearing on the face of the petition and affidavits in answer, the Court not only set the agreement aside, but declared plaintiff's title to the fishery.

Judgment.

In *White* v. *White* (*c*), where a deed was executed, purporting (by mistake) to convey a moiety only of real estate, the intention of the parties having been to pass the whole, the Court upon a bill for rectification, held that a conveyance of the other moiety by another deed was not necessary, and an order was made that the deed in the particulars after specified was executed by mistake, that it was intended to pass the entirety, and that the deed ought to be rectified, ordering rectification by words and figures accordingly, and directing a copy of the order to be indorsed on the deed.

There is jurisdiction in this case either to restrain an inequitable defence at law, or to reform the writing on

(*a*) L. R. 10 Eq. 599. (*b*) L. R. 2 H. L. C. 149.
(*c*) L. R. 15 Eq. 247.

which the suit at law is pending, so as to make it agree with the actual contract between the parties. And so long as it is within the jurisdiction of the Court to entertain the bill for relief on either ground, it is, I apprehend, in the power of the Court if it see fit, to grant complete relief and to do final justice between the parties.

No single instance, it is believed, can be found in which a plaintiff bringing forward a document as the foundation of his right has been allowed to say that the instrument which he makes the foundation of his action or suit does not express the real agreement into which he has entered. See per Lord *Hatherley* in *Druiff* v. Lord *Parker* (*a*). See also *Crawford* v. *The Western Assurance Company* (*b*). But where a plaintiff comes into a Court of Equity either to restrain defendants from setting up an inequitable defence, or to reform the written contract, the parties stand before the Court on a very different footing. The assertion in either of these cases is, that the writing does not contain the real contract, and the relief asked is either that defendants be precluded from saying that the writing does not contain the real contract, or that the writing be reformed so as to correspond with the real contract.

Judgment.

The bill here prays that the defendants may be restrained from either pleading in the action at law, or urging at the trial thereof that the policy covers only that portion of the plaintiffs' stock contained in the original store.

I think, beyond question, that it is the duty of the Court on the facts to grant the first alternative, and I feel not much, if any doubt, about the power of the Court, if deemed expedient, to grant the second alternative.

(*a*) L. R. 5 Eq. 131. (*b*) 23 U. C. C. P. 365.

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The defendants ought not in any Court to be allowed, as against the plaintiffs, to contend either that they were ignorant of the contract made by their agent, or that such contract is not their contract.

In a case like the present it must be intended that the knowledge of the agent is the knowledge of his principals. The policy does not, according to the decision of the Queen's Bench, express what *Hooper*, the agent, and the plaintiffs intended. If as between *Hooper* and the plaintiffs there is mutual mistake, it ought to be held that as between the plaintiffs and the defendants there is mutual mistake, and upon this ground that *Hooper's* contract till cancelled is their contract. The Court does not make a new contract between the parties, but in a proper case it reforms the writing to make it express the real contract. The Court cannot permit either party to plead ignorance of the real contract when once established to the satisfaction of the Court. If the contract thus established be one thing and the writing another and different thing, there is such mistake as is properly said to be mutual or common to both parties. Earl *Beauchamp* v. *Winn* (*a*), *McKenzie* v. *Coulson* (*b*), *Druiff* v. Lord *Parker* (*c*), *Forrester* v. *Campbell* (*d*), *McDonald* v. *Ferguson* (*e*), *Kane* v. *Kane* (*f*).

Judgment.

No doubt the power to reform a written contract is one which should, like any other extraordinary power of any Court, be exercised with extreme care and attention, Lady *Shelburne* v. Lord *Inchiquin* (*g*), Marquis of *Townshend* v. *Stangroom* (*h*), *Mortimer* v. *Shortall* (*i*), *Fowler* v. *Fowler* (*j*). See also *Graves* v. *The Boston*

(*a*) L. R. 6 H. L. 223.
(*b*) L. R. 8 Eq. 368.
(*c*) 5 Eq. 131.
(*d*) 17 Gr. 379.
(*e*) 17 Gr. 652.
(*f*) L. R. 20 Eq. 698.
(*g*) 1 Bro. C. C. 338.
(*h*) 6 Ves. 328.
(*i*) 2 Dru. & War. 363.
(*j*) 4 DeG. & J. 250.

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Insurance Company (*a*), *Lyman* v. *The United States Insurance Company* (*b*), *Andrews* v. *The Essex Fire and Marine Insurance Company* (*c*), *Delaware Insurance Company* v. *Hogan* (*d*).

But if the ground for relief be clearly established a Court of Equity will not decline to grant relief merely because on account of the circumstances which have intervened since the agreement was made it may be difficult to restore the parties exactly to their original condition. Earl *Beauchamp* v. *Winn* (*e*).

It may appear to be hard on an insurance company to reform a policy after a loss, and after all opportunity of continuing or cancelling the risk is gone. But it would be equally hard to deprive a person of insurance when really insured merely because, at the time of the loss, the policy of insurance which he held and which was prepared by the insurers did not truly express the contract between the parties.

Judgment.

In the old case of *Henkle* v. *The Royal Insurance Company* (*f*), Lord *Hardwicke* said, "The plaintiff comes to do this in the harshest case that can happen: of a policy, after the event and loss happened, to vary the contract so as to turn the loss on the insurer who otherwise, it is admitted, cannot be charged; however, if the case is so strong as to require it, the Court *ought* to do it." See further, *The National Fire Insurance Co.* v. *Crane* (*g*).

I admit that if the facts disclose no more than mistake arising from the inadvertence of the agent the case would not be a proper one for relief: *Parsons* v. *Rignold* (*h*). So if the contract were one clearly in ex-

(*a*) 2 Cranch, Sup. C. R. 419.
(*b*) 2 John. C. 631.
(*c*) 3 Mason 6.
(*d*) 2 Wash. Cir. 4.
(*e*) L. R. 6, H. L. 223
(*f*) 1 Ves. Sr. 317.
(*g*) 16 Maryd. 260.
(*h*) 13 Jur. 518.

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cess of the powers of the agent: *Fowler* v. *The Scottish Edinburgh Equitable* (*a*). But so far as *Hooper* was concerned, although his testimony is not as clear as it might have been, it shews more than a case of mere inadvertence. It shews, according to my understanding of it, a deliberate contract between himself and the plaintiffs, he acting for and on behalf of the defendants.

The contract was one which on the evidence he had full power to make. The contract, therefore, was one binding on the defendants, whether he communicated what he had done or omitted to do so. Their knowledge of his conduct was unnecessary to make the contract binding on them. If, owing to his neglect, they are now called upon to make good a loss of the liability to which they had not knowledge before the loss, I presume they have their remedy against him for neglect of duty. But so far as the plaintiffs are concerned the defendants ought to be precluded from asserting that they had not

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that knowledge which their agent had, and which he, their agent, neglected to communicate.

The money was paid by the plaintiffs as the premium for an insurance on the whole of their stock. Having been so received by the agents of the defendants, and never repudiated till after loss, I think the defendants should be precluded from saying the contract was otherwise than as made between the plaintiffs and their agent.

In *Wing* v. *Harvey* (*b*), Lord Justice *Bruce* said, "The directors taking the money were and are precluded from saying they received it otherwise than for the purpose and in the faith for which and in which Mr. *Wing* expressly paid it."

And Lord Justice *Turner* in the same case said "The

(*a*) 4 Jur. N. S. 1169. (*b*) 5 DeG. McN. & G., 265.

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office undoubtedly received the money from the agents, to whom it had been paid on express terms and conditions, and the office having held out Mr. *Lockwood* and Mr. *Thompson* to the world as their agents for the purpose of receiving premiums, I think it became the duty of Mr. *Lockwood* and Mr. *Thompson*, and not that of the plaintiff, to communicate to the head office at Norwich the circumstances under which the premiums had been paid to and received by them, and the representations which were made on the occasion of such payments and receipts."

Upon a similar ground notice of facts to an agent is constructive notice thereof to the principal himself where it arises from or is connected with the subject matter of his agency, for "upon general principles of public policy it is presumed that the agent has communicated such facts to the principal; and if he has not, still the principal having entrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal, otherwise the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party." (*a*)

Judgment.

The increased premium here was received by the agent in the course of his business as agent, and was received deliberately as the consideration for an insurance by the defendants on all the stock in both buildings. When so received, his contract, according to the testimony of *Smith* and according to the law of the land, is binding on the defendants, and must be held to be binding whether communicated or not, so binding that the defendants are precluded from setting up that the contract was otherwise than as the agent agreed, and so binding that the writing if at variance with that agreement should, in my opinion, be rectified in accord therewith.

(*a*) *Story* on Agency, sec. 140.

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These principles are not new. They are the same as enunciated in *Wing and Harvey* (*a*), by Lords Justices *Knight Bruce* and *Turner*, and by Chancellor *Van-Koughnet* in *Patterson* v. *The Royal Insurance Company* (*b*), and by many other Judges of eminence in many other cases not necessary to be mentioned. (*c*)

Judgment.

Applying these principles to the case before us, I think the decree of the Court of Chancery should be in all respects sustained, and that the appeal should be dismissed with costs.

Per *Curiam* : Appeal dismissed with costs*.

Re Burritt.

Quieting Titles Act—Onus of proof.

In proceeding to quiet a title under the Act, the petitioner adduced evidence to prove a possessory as also a paper title to lot 24 in the "broken" concession. The contestant claimed title to lot 24 in the "first" concession, and asserted that the "broken" and "first" concessions were one and the same.

Held, that the onus lay upon the contestant of proving this fact, and not upon the petitioner, who had already established a *primâ facie* title.

This was a proceeding for quieting a title before the late Referee of Titles.

Statement.

The petition was filed to quiet the title of *Edmund Burritt* to lot 24, broken concession of Gloucester, Rideau Front, and the petitioner's claim was contested.

It appeared from the papers filed that in the township of Gloucester, on the front facing the river Rideau—

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* The defendants have since carried the case to the Supreme Court.

(*a*) 5 DeG. McN. & G. 265. (*b*) 14 Grant 170.

(*c*) See cases in note 3 to sec. 140 of *Story* on Agency, 8th ed.

there being another front facing on the river Ottawa —patents were issued for lots described, variously, as of the broken concession, first concession, and front concession. 1876. Re Burritt.

The patent in this case was issued for lot 24 in the broken concession, and the metes and bounds given in it shewed that it covered ground in the first concession as well as in the broken concession—a concession line having been run about the same time the patent issued, dividing the whole of the land in front of the second concession into two concessions. The patentee shortly afterwards granted lot 24 in the "front" of Gloucester to one *Ephraim Jones*. No deed in the chain of title of the petitioner for lot 24 in the broken concession appeared to have been made by the patentee.

Mrs. *Jones*, the contestant, claimed title through the said *Ephraim Jones*; the said *Ephraim Jones* devising to the said contestant's late husband lot 24, in the "first" concession. The said *Ephraim Jones* also gave a general devise of all his property to several persons as tenants in common, one of whom was the contestant's late husband. Statement.

The petitioner having filed affidavits shewing a *primâ facie* right to the land by length of possession, and an inquiry having to be directed, a question arose as to the party on whom the onus of proving their case should lie. The petitioner objected to it lying on him as he had proved a *primâ facie* case, and he sought to have it thrown on the contestant, as she had not made out a *primâ facie* title to the lands.

The Referee, holding that where a party presents a petition to have his title quieted under the Act he should prove his whole case, directed a reference to the Master at Ottawa to take evidence

1876. Re Burritt. upon the questions at issue between the parties. (1.) "Whether the petitioner *Edmund Burritt* hath or hath not a good paper title to the above described parcel of land. (2.) Whether the said *Edmund Burritt* hath or hath not acquired a good title by possession to the said land, or to any, and if any what part thereof? (3.) Whether the said contestant has a good paper title to the said land as devisee of *Alpheus Jones*, deceased. (4.) Whether the contestant hath or hath not any, and if any, what undivided estate or interest in the said land, or in any, and if any what part thereof, as devisee of the said *Alpheus Jones* deceased?" The evidence thereunder to be returned to the Referee.

From this direction of the Referee the petitioner appealed.

Mr. *W. R. Mulock*, for the petitioner.

Mr. *George McKenzie*, contra.

August 23rd. Judgment. BLAKE, V. C.—The petitioner claims to be entitled to a certificate under the Act in his favour quieting his title to lot 24 in the broken concession of Gloucester. The petitioner has been in possession of the lot for over twenty-five years, and for the last fifty years whatever possession there has been has followed the title under which he claims. The deed from the patentee *Hamblin* to *Rice Honeywell*, said to have been executed in 1825, has been, it is alleged, lost. This loss was accounted for and the contents of the deed satisfactorily proved to the referee, and on the 28th of November, 1874, he allowed the notice to issue which is granted where the petitioner has made out his *primâ facie* case.

In answer to this notice a contestant appears, who claims under one *Ephraim Jones*, whose title appears to be that of vendee of *Hamblin*, the patentee of the Crown.

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This conveyance from *Hamblin* to *Jones* is of lot 24 in the "front" of Gloucester, and the lot is referred to in the will of *Jones* as lot 24 in the first of Gloucester. The lot in question is patented as lot 24 in the broken concession on the river Rideau, in the township of Gloucester. The petitioner claims a lot on the broken concession. The contestant claims a lot in the "front" or "first" concession. The Referee thinks the petitioner has made out a *primâ facie* title to the lot he claims. This title is in no way interfered with by the contestant unless it turns out that the land she claims is identical with that as to which the petitioner is seeking for a certificate. It is for the contestant to establish this before she can be heard to dispute the position which the petitioner claims. It may be there is a "front" or "first" concession and a "broken" concession, as we frequently find it in this country, and it may be that the claim of the contestant cannot interfere with what the petitioner is seeking for. I am of opinion that this matter should be cleared up before the parties are called upon to go into the expensive inquiry set out in the direction made by the Referee. The order made by him will, therefore, be discharged, and the contestant be required in, say a month, to establish her position to the satisfaction of the Referee, whereupon such further order, if any, as the then circumstances of the case warrant can be made by him. Costs to be disposed of when the question of title is being finally settled.

Judgment.

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TAYLOR V. TAYLOR.

Principal and agent—Trustee and cestui que trust.

In 1851 the plaintiff who had gone to reside in California, empowered his brother in Canada to sell certain lands. In 1853 the brother agreed to sell the property to *W.*, and in 1856 executed a conveyance of the property to *W.* for the alleged consideration of $1,000, and *W.* immediately reconveyed to the brother one-half of the estate for an alleged consideration of $200. In October, 1873, the plaintiff returned to Canada, and in January following filed a bill impeaching the transactions between his brother and *W.* and seeking to have them declared trustees of the estate for him. At the hearing the plaintiff and his brother compromised their difficulties by each taking one-half of the property conveyed to the brother. The Court in view of all the circumstances and of the time that had elapsed since the transaction was completed, refused to set aside the conveyance to *W.* and dismissed the plaintiff's bill with costs.

Statement.

The bill in this cause was filed by *William Johnson Taylor*, against *George Taylor*, *Adam Henry Wallbridge* and *George Simpson*, setting forth that in 1851 plaintiff was seized in fee of lot number 8, in the second concession of Thurlow, and being then resident in California on the 11th of October in that year, executed a power of attorney in favour of the defendant *George Taylor* in the words following, that is to say:—"Know all men by these presents, that I, *William Johnson Taylor*, at present of Carson's Creek, County of Calaveras, State of California, United States of America, but formerly a resident of Kingston, in that part of Her Britannic Majesty's Dominion, known as Canada West, hath made, constituted and appointed, and by these presents, doth make, constitute and appoint *George Taylor*, of Belleville, in that part of Her Britannic Majesty's Dominion, known as Canada West, my true and lawful attorney for me, and in my name and behalf to sell all that certain tract or parcel of land, known as lot number eight, second concession of the township of Thurlow, in the Victoria district, and province of Canada, aforesaid. As also to act as my attorney in the sale or leasing of

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any lands of which I am the owner in the said province of Canada, aforesaid. Hereby ratifying and confirming the act or acts of my said attorney. In witness whereof, I have hereunto set my hand and seal at Carson's Creek, as aforesaid, this eleventh day of October, one thousand eight hundred and fifty-one." That in the year 1856 one *Joseph Canniffe* exhibited a bill in this Court, claiming to have an interest in the said land which was defended by the defendant *Taylor* as attorney and agent of plaintiff acting through *Louis Wallbridge* and the defendant *Wallbridge* practising as solicitors in co-partnership, and the bill therein was dismissed ; that in December, 1856, the defendant *Taylor*, acting as attorney for the plaintiff, pretended to convey the said lot to defendant *Wallbridge* for the expressed consideration of $1,000, and that *Wallbridge* on the same day conveyed back to *George Taylor* one-half of the said lot for an expressed consideration of $200 ; the object of the bill was to have it declared that the defendants were trustees for the plaintiff of the lands and moneys derived from the sale of them ; that the defendants might be ordered to reconvey the portions unsold, and account to the plaintiff for the moneys received for the portions that had been sold.

Judgment.

The defendants *Taylor* and *Wallbridge* answered, setting up that the lot had been originally leased by King's College to *John Taylor*, father of the plaintiff and defendant *Taylor* ; that after his death his widow *Jane Taylor* agreed to purchase the lot from the College, paying an instalment of the purchase money, but no deed was to issue until all paid ; that *George Taylor* had agreed with his mother to purchase her interest which she transferred to him, and he, subsequently, and in 1851, assigned his interest to the plaintiff who was then in California, the defendant's object being to enable him to deny the ownership of the land in the suit brought by *Canniffe ;* that *George Taylor* subsequently

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paid the purchase money to King's College, and procured a deed from that body to the plaintiff—and which was the mode, *George Taylor* alleged, that plaintiff became possessed of the title to the land. The defendant *Wallbridge* insisted that *George Taylor* was really the owner of the land, and that his purchase from him was made in good faith. *Taylor* and *Wallbridge* denied all fraudulent practices in reference to the alleged transactions.

The bill was taken *pro confesso* against defendant *Simpson*, who claimed only some interest as tenant under defendant *Taylor*.

The other facts of the case appear in the judgment of the Court on rehearing.

Statement.

The cause came on to be heard at the sittings of the Court at Belleville, in November, 1874, when the plaintiff and defendant *Taylor* came to a settlement by which it was agreed that they should divide the fifty acres held by defendant, each taking twenty-five acres and paying his own costs; such settlement to be without prejudice to the plaintiff's right of suit against defendant *Wallbridge*.

After hearing the evidence given and the views expressed by Counsel, PROUDFOOT, V. C., made a decree in favour of the plaintiff with costs, and directing an account between the plaintiff and *Wallbridge*.

The defendant *Wallbridge* thereupon reheard the cause.

Mr. *G. D. Dickson* and Mr. *Moss*, for the plaintiff, urged that the evidence taken at the hearing established satisfactorily that the lands and premises in question, at the time of and prior to the time plaintiff empowered

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the defendant *Taylor* to convey, and at the time of the execution of the deed of conveyance by him to the defendant *Wallbridge*, were the property of and belonged to the plaintiff, and that the execution of that deed was a pretended and simulated transaction ; that the transaction was not a sale, neither was it intended to operate as a sale of the property or of any part thereof ; and this was shewn conclusively by the fact that although all parties concede that it never was contemplated that *Wallbridge* should have more than one-half of the lot, yet the whole was conveyed to him ; in fact, the whole was a merely colorable transaction and was entered upon and carried out in the manner stated for the purpose of enabling the defendants *Taylor* and *Wallbridge* to divide the property between them. The plaintiff also contended that the sale authorized by the power was one for cash only, and the pretended sale to *Wallbridge* was not one for cash ; that this under the authorities could not be sustained as a proper exercise of the power, and that the defendant *Wallbridge* could not be heard to say he was a purchaser without notice, as he had full notice of the position and of the power conferred upon the defendant *Taylor*, who was clearly shewn to have been acting as the agent of the plaintiff ; and that the transaction was one between solicitor and client, thus throwing on *Wallbridge* the onus of establishing the *bona fides* of it : *Greenwood* v. *The Commercial Bank* (*a*), *Brown* v. *Smart* (*b*), were, with other cases, referred to.

Argument.

Mr. *Fitzgerald*, Q. C., and Mr. *Arnoldi* for the defendant *Wallbridge*, insisted that the facts and circumstances proved in the case fully established that the defendant *Taylor* was at the time of the conveyance to defendant *Wallbridge* in 1856, the equitable and beneficial owner of the 100 acres ; as also the attorney of

(*a*) 14 Gr. 40. (*b*) 1 E. & A. 146.

1876. Taylor v. Taylor. the plaintiff duly authorized by him to sell any estate or interest he had in the lands in question, and was competent to sell and convey the same and give a valid title to the defendant of such lands; and that by the sale and conveyance to the defendant he had acquired a valid title in the one-half thereof; that the dealing between *George Taylor* and defendant could be impeached on the ground of fraud only. He also insisted that the lapse of time was a sufficient bar to any relief being granted to the plaintiff; and the fact that the plaintiff had compromised the matter with the defendant *Taylor* ought to have the effect of precluding him from any relief against *Wallbridge*.

SPRAGGE, C.—*George Taylor*, agent of *William*, was subpœnaed in this suit as a witness by *Wallbridge*, but was called by the plaintiff. This was after a compromise between the two brothers. His story still is that the beneficial interest was in him, not in *William*;

Judgment. that a conveyance made to *William* was not in pursuance of any contract, but to enable *George* to swear in the *Canniffe* suit that the land was not his.

The dealing between *Wallbridge* and *George Taylor* was of earlier date than the paper of 1853. It was in 1851, as appears by the evidence both of *George Taylor* and *Wallbridge*, and they both at that date went into possession of the land.

The account of how the money was paid is very unsatisfactory, but there has been great lapse of time, and it was a closed transaction. From parts of the evidence of *George Taylor* one would gather that the dealings of *Wallbridge* in the matter were not honest—but in his evidence at page 13 of the depositions he says "I don't pretend that *Henry Wallbridge* owes me anything on this land; don't remember how we divided this land * * The transaction between us is fair and honest."

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Wallbridge has had possession ever since 1851. The agreed price between him and *George Taylor* was the value of the land. If not paid would not *George* have called upon him for payment whether the land was his or *William's?* If the consideration money, and that the value, was to be and was paid, what was the motive with *Wallbridge* to induce him to collude with *George* to cheat *William?* It would be being a rogue for another man's benefit.

It might be hard upon *Wallbridge* and would be of mischievous tendency upon a stale demand like this to put a purchaser to proof of all the circumstances under which he made his purchase, and how he paid his purchase money.

Judgment.

I think the bill should be dismissed; but I have hesitated as to whether it ought to be with or without costs as respects the defendant *Wallbridge*. He has in his answer put his defence, mainly at least, upon his purchase from *George*, and the title to the land being in *George*; and if his defence were a knowingly false one; that the land in fact was *William's*, and that he knew it, he should be refused his costs. The evidence leads me to believe that the land was *William's*, though it is unnecessary to decide that it was, but it is not clear to my mind that if so *Wallbridge* knew it to be so. Assuming that he knew of the assignment given by *George* to *William* he did know probably, if there is any truth in *George's* statement, that it was made under advice and for a purpose; and it is noticeable that *George*, in his evidence at the hearing, states persistently over and over again, that the land was his. What he says now, he said probably in 1851, 1853, and 1856, so that I am not satisfied that, assuming, the land to have been *William's*, *Wallbridge* knew it to be so, and knowingly placed a false defence upon the record. I should therefore give him his costs, the general rule being sound and salutary.

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The question as to the title to this land has been between *George* and *William*, each claiming under *Jane Taylor*, the widow of the lessee of the land from the college, and executrix of his will, and to whom the college made a conveyance of the land. The land is dealt with by the testator in his will. It was not to the interest of *George* or *William* to question the right of *Jane* to dispose of the land as her own as she did, and the right she assumed has not been questioned by either, and no other rights have been dealt with in this suit, if, which I do not say, any other rights exist.

Judgment.

Blake, V. C.— *William Taylor*, the plaintiff, being about to leave Canada, on the 9th of November, 1847, assigned to his brother *George*, his interest in the whole lot in question, 100 acres. *William* remained away from the Province from 1848 or 1849 until 1873. *George* anticipated some litigation with one *Canniffe* as to the lot, and he, without the knowledge of his brother *William*, re-assigned the property to him on the 12th of April, 1851, and in the same month a deed of the lot issued from the College to *William* as such assignee. In order that *George* might be enabled to deal with the land he sent to his brother in California, a power of Attorney which is dated 11th of October, 1851, and enabled him to sell the land. On the 7th of July, 1853, the following memorandum was signed by the defendants *Taylor* and *Wallbridge* :—

"Received from *Adam Henry Wallbridge*, the sum of £90 5s., on account of purchase of half of lot No. 8, second concession of the township of Thurlow and county of Hastings, which I have agreed to sell to him for £215 ; said *Wallbridge* to bear half of the expenses of the suit now going on respecting said half lot, in the Courts of Chancery and Queen's Bench. The remaining $500 to be paid this fall. If the suit in Chancery does not turn out successfully then each party to sustain half

the loss, and the said *Wallbridge* is not then to pay $500." 1876.

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On the 12th of June, 1856, the *Canniffe* litigation ended. In December, 1856, *George Taylor*, attorney of *William Taylor*, conveyed the whole lot to the defendant *Wallbridge*, for the expressed consideration of £215, and on the same day *Wallbridge* conveyed to *George Taylor* the south half of the 100 acres.

Messrs. *Burns* and *Mowat* were the solicitors for the defendant in the suit of *Canniffe* v. *Taylor*, and Mr. *Lewis Wallbridge* acted as his legal adviser in Belleville. The defendant *Wallbridge* was employed in the office of his brother prior to the institution of these proceedings, and in February, 1853, he entered into partnership with him.

It is not clear on the evidence whether as a matter of fact *George* or *William* owned this lot. If *George* owned it, he had, of course, the right to sell or give it to his co-defendant ; if he did not own it, he could for value sell it under the power his brother had given him. *George* had never sought to impeach the sale made to *Wallbridge*, although it is now over 21 years since it was made. After this lapse of time I think the onus of proof may fairly be cast on the person attacking the transaction. It is true that Mr. *Lewis Wallbridge* did act throughout the *Canniffe* litigation in the interest of the plaintiff on the retainer of his brother *George*. The plaintiff was not aware of this litigation. It could scarcely be argued that the relation of solicitor and client as between the defendant *Wallbridge* and the plaintiff existed, so as to bring the case within the rule, which avoids transactions ordinarily entered into between those occupying the position of attorney and client. Judgment.

There is no evidence of any collusion or fraudulent

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conduct as between or on the part of the defendants. *Wallbridge* produces the agreement of July, 1853, and the conveyance of October, 1856, as evidence of his title to the land and the manner that he became possessed of it.

It is true, on reading the depositions, there is more or less suspicion cast upon the transaction, owing, perhaps, to a certain extent, to the failing memory of the defendant *George Taylor*, caused by the illness from which he has suffered; but after giving the testimony all the weight to which I think it can be entitled, I am unable to conclude that there is any proof on which a Court could safely say that the defendant *Wallbridge*, has possessed himself of the premises in question under circumstances that justify this Court in interfering to take them from him. Not finding it proved that the land was obtained by any fraudulent contrivance between the defendants, I think it out of the question that *George Taylor* could be allowed now to question the transaction, and I do not think, following by analogy the rule laid down in 25 Vic., ch. 20, that the absence of *William Taylor* affords a sufficient reason for allowing him to impeach a transtion which his agent could not open up.

Judgment.

The Court of Chancery usually follows in its practice the rules laid down in the various statutes of limitations; and, if absence from the country be now removed as a ground of exception to the running of the statutes of limitations, in case possession of the premises was sought at law, I think we may well say, in this case, that a similar rule might well be invoked.

If collusion between the co-defendants were proved, I think the plaintiff would be entitled to relief; but as this is not so, I think he is left to his remedy for an account against his agent, the defendant *George Taylor*; and that the bill should be dismissed as against *Wallbridge* with costs. I think the plaintiff should pay the costs of this re-hearing.

PROUDFOOT, V. C.—The theory of the defence principally relied on in the answer of *Wallbridge* is, that the land was really *George Taylor's*; that he had a right to deal with it as he chose, and that *Wallbridge* purchased from *George* for a valuable consideration without notice of the plaintiff's title. A clause is indeed to be found in the answer, claiming title under the power of attorney, but no great reliance is placed on it. At the hearing the same course was pursued, *Wallbridge's* counsel principally directing his efforts to establish property in *George*; and claiming also with less reliance on the title, under the power of attorney. Because this latter point had not been thoroughly discussed, I gave leave to rehear after the time for doing so had elapsed. Further consideration has confirmed my conviction, that the land belonged to the plaintiff; that the assignment from *George* to *William*, of 30th October, 1851, was for value; that from *William* to *George* of 29th November, 1847, was not for value; and when *George* re-assigned to *William* in April, 1851, and got the deed in *William's* name, he was placing the title where it rightfully belonged. The power of attorney, and *George's* evidence in *Canniffe* v. *Taylor*, are conclusive to my mind. And I also think that notice to *Wallbridge* was satisfactorily established.

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Judgment.

The transaction between *George* and *Wallbridge*, is somewhat complicated. The evidence is not satisfactory of the payment of the £215 by *Wallbridge*. *Wallbridge* in his evidence says, he thinks it was his money that was paid to the College, but is not certain. *George Taylor* says he borrowed the money from another person and paid the College, and that *Wallbridge* paid none of it.

There is a receipt of £90, acknowledged by *George* from *Wallbridge*, in the agreement of 7th July, 1853, but it does not appear when that was paid; the whole

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sum due to the College must have been paid in 1851, before the execution of the deed. Had *Wallbridge* paid the money that was paid to the College in 1851, I would have expected to find it all acknowledged in the receipt of 1853.

I am sensible of the difficulty the defendants labour under in being required at so great a distance of time to prove these payments, but *Wallbridge* was dealing with *George*, the agent of the plaintiff, and made the conveyances in such a manner that the agent got half the land —the agent executing a conveyance under the power of attorney to *Wallbridge*, of the whole lot, and *Wallbridge* deeding back half to the agent. I would have expected that in a transaction of that nature more than ordinary care would have been taken to preserve a record of the transaction, if the transaction was intended to be a fair and open one.

Judgment.

I am also inclined to believe that such a fiduciary relation existed between *Wallbridge* and the plaintiff, as this Court considers sufficient to cast the onus of shewing the righteousness of the dealings on *Wallbridge*. There is no doubt that *Lewis Wallbridge*, a brother of defendant *Wallbridge*, was attorney for the plaintiff in the *Canniffe* suits. The defendant was in his brother's office : was cognizant of all that was going on: his name was used as attorney in the ejectment suit: knew the relations between the plaintiff and *George;* and took a deed from the latter as agent for the former.

But as the other members of the Court take a different view on both these points, I do not feel so confident in my own opinion as to lead me to dissent from their conclusions.*

* The plaintiff has since carried the case to the Court of Appeal, and it is expected to be argued at the sittings in December next.

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STANDLY V. PERRY.

Accretions to lands—Administration of Justice Act—Rights of public—Practice—Injunction—Damages—Private injuries—Parties—Highway.

The accretions of soil to the lands of a private individual by action of the elements belong to the owner, and in the same way accretions to a public highway are taken to be and form part of such highway.

The Cobourg Harbour Company was authorized by statute to construct a harbour and to erect all such moles, piers, wharves, buildings, and erections useful and proper for the protection of the harbour; and for the accommodation and convenience of vessels entering the harbour, and this right was by subsequent legislation vested in the Town Council of Cobourg.

Held, that this did not authorize the Company or the Town Council in building a storehouse and fence on land formed by crib-work constructed by the Company and gradual accretions from the lake (Ontario) in front of the plaintiff's land, which went "to the water's edge," in such a manner as to prevent plaintiff having free access to the waters of the lake.

The Mayor of Cobourg was *ex officio* a member of the commissioners of the Cobourg town trust when certain acts complained of were done, but ceased to be such before the institution of a suit by a party injured by such acts to be relieved in respect thereof.

Held, notwithstanding that he was a proper party to the bill.

The directors of a harbour company were empowered by the Legislature to construct, and agree with the owners and occupiers of land, upon which they might determine to cut and construct the harbour, either for the absolute purchase of the land or for the damages the owners or occupiers might be entitled to receive in respect thereof.

Held, that this did not authorize the Company to shut up a public street or highway, or prevent the free use thereof by the public.

Under the Statute 28 Vic. ch. 17 sec. 3, and the Administration of Justice Act, (1873,) this Court is bound, where damages are shewn to have been sustained by a plaintiff to give him full relief in any suit brought before it, by directing an inquiry as to the damages sustained; and the Court is not at liberty to send the plaintiff to law for the purpose of obtaining such damages.

Statement.

The bill in this case stated that the plaintiff was the owner of a piece of land situate in the town of Cobourg, part of township lot 16 in the broken

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front fronting, on Division Street, with a depth of two chains, extending from Charles Street to the water's edge of Lake Ontario. That Division Street extended all along the front of the plaintiff's land, and the only means of access to his land was from that street. Division Street was the original allowance for road between lots 16 and 17 in the broken front concession B of the township of Hamilton, and was a common and public highway. The bill further stated that the defendants other than *The Attorney General*, had lately erected and had ever since maintained a fence upon the said highway along the front of the plaintiff's land, and between it and the highway, and thus prevented the plaintiff from having access to his land from the highway. That the same defendants had also lately removed a certain storehouse from where it had theretofore been to and upon the said highway and placed it upon the highway in front of the plaintiff's land, and within a few feet thereof, so as to obstruct and hinder the plaintiff from having access to his land from the highway, and from building upon his land. That the plaintiff suffered substantial damage from these acts of the defendants, peculiar to himself and different from that suffered by the public, and that plaintiff, when these works were commenced, had notified the defendants not to go on with them, and if persisted in he would take proceedings for their removal. The plaintiff prayed that these defendants might be ordered to remove the fence and storehouse, and might be ordered to pay to plaintiff the damage suffered by him by reason thereof.

Statement.

The defendants *Perry*, *Gravely*, *Dumble*, *McCallum*, and *Boulton*, answered the bill setting forth the several statutes relating to the Cobourg harbour, and justified the acts complained of as done to protect and preserve the harbour and piers and property thereof; and objected that *Sutherland* was not a proper party, but that the present Mayor of the town, *Guillet*, was.

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The defendant *Sutherland*, who, as Mayor of Cobourg, had been *ex officio* a member of the Commissioners of the Cobourg town trust for the year 1875, but had ceased to be so before the filing of the bill, also answered justifying the acts complained of as being done in the discharge of the duties of the Commissioners, and within the powers conferred on them by the Statutes. He also objected to his being a party to the suit, having acted *bonâ fide* in the discharge of the duties imposed on him by law.

The bill was taken *pro confesso* against *The Attorney General.*

In 1829 a company was incorporated (by 10 Geo. IV. ch. 11) called "The President, Directors and Company of the Cobourg Harbour," who were authorized (sec. 2) to construct a harbour at Cobourg for the reception of such vessels as commonly navigate Lake Ontario, and to erect and build such needful moles, piers, wharves, buildings, and erections as should be useful and proper for the protection of the harbour, and for the accommodation and convenience of vessels entering, lying, loading, and unloading within the same; and by section 3, the Directors were empowered to contract and agree with the owners and occupiers of land upon which they might determine to cut and construct the harbour, with all necessary and convenient roads, streets, and approaches thereto, either for the absolute purchase of the land or for the damages the owners and occupiers might be entitled to receive from the Company in consideration thereof. By section 4, the Company were empowered to levy tolls on goods, &c., shipped or landed upon any part of the lake shore between the east boundary of lot 13, and the west boundary of lot 19 in the township of Hamilton. By section 5, the harbour, moles, piers, wharves, buildings, erections, and materials were vested in the Company.

tatement.

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In 1850, for various reasons therein recited an Act (13 & 14 Vic. ch. 83) was passed which dissolved the Company, and the harbour &c., were vested in the town of Cobourg, and the harbour was declared to be within the limits and form part of the town of Cobourg.

In 1859 (22 Vic. ch. 72), the harbour, wharves, piers, and appurtenances thereto belonging were, with other property of the town of Cobourg, vested in commissioners, called "The Commissioners of the Cobourg Town Trust," who were named in the Act, and provision made for filling vacancies.

By the 36 Vic. ch. 120 sec. 3, (Ont.,) the Mayor of the town of Cobourg was declared to be *ex officio* a Commissioner of the Cobourg Town Trust.

Statement.

Nearly all the land to the south of Charles Street in front of Division Street had been formed by the Harbour Commissioners, or those who succeeded them, and by gradual accretion from the soil of the lake ; and the land in front of the plaintiff's property, for a considerable number of chains, had been formed by accretion. Cribs were placed by the Company in front of Division Street in 1830, and others added afterwards, but the greater part of the cribbing was done for the use of the Grand Trunk Railway Company in 1853 and 1854.

The storehouse in question had been built about half way down the pier, and was moved at the instigation of the Harbour Master, *Burnham*, who wanted storage more convenient for shipping—part of it was moved towards the end of the wharf, the rest was placed in front of the plaintiff's property, which he, *Burnham*, swore was the most convenient place for shipping.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at Cobourg, in May, 1876.

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Mr. *J. D. Armour*, Q. C., for the plaintiff.

Mr. *S. Smith*, Q. C., and Mr. *Boyd*, Q. C., for the defendants other than *The Attorney General* against whom, as already stated, the bill was taken *pro confesso*, and who did not appear at the hearing.

For the plaintiff it was contended that although the 10 Geo. IV. ch. 11, authorized the Company to construct a harbour by not one of its provisions, could it be asserted, were they empowered to close up, take, or appropriate in any manner any public highway; and certainly it conferred no power to interfere with a highway for the purpose of constructing a storehouse thereon, not for use in carrying on the business of the Company, but in order to rent to others. The Statute 59 Geo. III. ch. 1, declares that all allowances for roads were to be deemed and taken to be common and public highways, and this provision was in effect re-enacted by 22 Vic. ch. 99 (1858). But even if the Company were authorized to place erections on the highway this certainly did not empower them to prevent the public having free and unrestricted access to the water. *Marshall* v. *Ulleswater Co.* (*a*). Acts of this nature are to be construed restrictively: *Galloway* v. *The Mayor of London* (*b*), *Magee* v. *London and Port Stanley Railway Co.* (*c*). It is clear the store could never have been intended for the use of the Company, as in *Logan* v. *The Cobourg Harbour Co.* (*d*), the Company had distinctly disclaimed a right to be wharfingers or liability as such. *The Eastern Counties Railway* v. *Dorling* (*e*), *Hood* v. *The Harbour Commissioners of Toronto* (*f*), *Moore* v. *The Corporation of Esquesing* (*g*).

Argument.

(*a*) L. R. 7, Q. B. 166 and 3 B. & S. 732.
(*b*) L. R. 1 H. L. 34.
(*c*) 6 Gr. 170.
(*d*) 3 U. C. R. 55.
(*e*) 5 C. B. N. S. 821.
(*f*) 34 U. C. R. 87.
(*g*) 21 U. C. C. P. 277.

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Williams v. *Wilcox* (*a*), were also referred to.

For the defendants it was contended that the plaintiff did not shew such special injury to himself as to entitle him to institute this suit. That the premises were not a highway but a wharf which the public had a right to use, but the Company had a right to erect whatever buildings they pleased upon it, so long as such buildings were for the use of and used for the purposes of the harbour; that the Company had the right to construct piers on the land covered with water; and had a right to the street (produced) under the water; that the Statute 13 & 14 Vic. ch. 83 (passed in 1850) recognized the works then erected, and the fee of these was sold to and vested in the Town Council; that the Act 22 Vic. ch. 72, speaks of "appurtenances," and this must be taken to have meant the esplanade and buildings, as the warehouse now in question had been erected in 1854, and section 14 of the Act authorizes leases to be made; that the question really was, was this a highway or was it not? and they contended that the several Acts passed in reference to it shewed that it was not, and that no user would prevail against the rights of the public, referring amongst other authorities, to *City of Hamilton* v. *Morrison (b)*, *Houck* on Rivers, &c. pages 242–244. *Phear* on Rights of Water, page 46.

Argument.

Mr. *Armour*, Q. C., in reply. No argument can be based upon the fact that the Legislature sold to the Town Council as it would be assumed by them that the Company had not exceeded the powers conferred upon them by their charter, and besides this, it is shewn that in 1850 there was not any storehouse on the property. The Harbour Company permitted the plaintiff to erect

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(*a*) 8 A. & E. 314.

(*b*) 18 U. C. C. P. 228.

his house on the accretion making no objection, and they will not be allowed now to dispute his right to be there. The leases authorized by section 14 of the Act were of the harbour only, not of buildings. *Logan's* case, therefore, still applies. The word "appurtenances" would not carry the esplanade, as land cannot be appurtenant to land.

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PROUDFOOT, V. C.—A number of witnesses as well for the defendants as for the plaintiff prove that people drove down the east side of the made land to the water. In 1830 cribbing was done to keep the sand from being washed away. The first crib caused a good deal of discontent; it was put to prevent people from digging and not to prevent the public from passing over it. It was always understood to be a public thoroughfare, (*Evans.*) On the east side people always came down to the water. It was supposed the land made in front of the street was street, (*Beattie.*) Before the storehouse was placed where it is the ground was used by the public coming and going at their pleasure, (*Hargraft.*) These statements taken from witnesses called by the defendants sufficiently shew that till recently the defendants never claimed to exercise any exclusive ownership over the extension of the highway; that it was used by the public as a highway; that by it they gained access to the water, without objection by the defendants.

July 8th.

Judgment.

Some of the defendants' witnesses were called to prove that storehouses were necessary for the convenient use of the harbour. However that may be, and whether they came within the terms of the Act, or the authority of the Harbour Company, or the Commissioners, I think need not be inquired into in this instance, for, as a matter of fact, the storehouse in question is leased for a term of five years, and the tenant, *Hargraft*, tells us that he can use the storehouse for any purpose he chooses. It is no accommodation to the

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Commissioners, as it was leased to him. He also says that storehouses are not necessary for the Commissioners to do their harbour business. And in *Logan* v. *The Cobourg Harbour Commissioners* (*a*), it was held that the Harbour Commissioners were not wharfingers, in which capacity storehouses might be needed. Sir *John B. Robinson* saying, "There is certainly nothing in the charter to give them by neccessary implication the power of carrying on business as *wharfingers;* and if they desired to do so, it would become a question whether they could legally make that use of their charter."

That the storehouse where now placed is a nuisance to the plaintiff, was scarcely denied by the defendants, but if it had been denied the evidence is uniform that it and the fence, which has been erected by the defendants, obstruct the access to the plaintiff's land, and are a nuisance. The defendants contended that it was no more a nuisance to him than to the public in general, but I apprehend, although the erections are on the highway, they are a source of peculiar damage to the plaintiff, whose land adjoins it, and from access to which he is debarred. *Soltau* v. *DeHeld* (*b*), *Green* v. *London General Omnibus Company* (*c*), *Rose* v. *Groves* (*d*), *Rose* v. *Miles* (*e*).

Judgment.

The accretion of the soil in front of the plaintiff's land must be taken to belong to the plaintiff. The bill alleges the plaintiff's title to the land *to the water's edge*, and *The Attorney General*, on behalf of the Crown, allows that allegation to be taken *pro confesso*, and it must therefore be assumed to be true.

The patent for lot 16 in the broken front granted in

(*a*) 3 U. C. R. 55.
(*b*) 2 Sim. N. S. 133.
(*c*) 7 C. B N. S. 290.
(*d*) 5 M. & G. 613.
(*e*) 4 M. & S. 101.

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1802 to *Edward Nickerson*, describes the land as commencing where a post has been placed in front of the said concession, at the south-east angle of the said lot 16 upon Lake Ontario, and the western line of the lot as running to Lake Ontario, and then easterly along the shore to the place of beginning. The nature and manner of the accretion was not very distinctly shewn in evidence, but it did appear to be, and the defendants in their answer admit it to be, the result of gradual accumulation since 1832, and might therefore well fall within the maxim "*De minimis non curat lex.*" *Phear* on Rights of Water 43, *Houck* on Rivers, sec. 242, *Throop* v. *The Cobourg and Peterboro' Railway Co.* (*a*). The Harbour Commissioners set up no right or claim to the accretions in front of the lands of private owners between the lots 13 and 19, and I apprehend they can have no greater right to the accretion in front of the road allowance, or, as one of their witnesses said, the land in front of the street was street.

Judgment.

The 50 Geo. 3, ch. 1 sec. 12 had declared that all allowances for roads made by the King's surveyors in any town or township already laid out, or which should be made in any town or township, &c., should be deemed common and public highways. This enactment was in substance repeated in 22 Vic. ch. 99 sec. 300, and section 301 declared the soil and freehold of every highway or road altered, amended, or laid out according to law shall be vested in Her Majesty, her heirs and successors. Section 305 prohibited any municipal council from closing up any public road or highway whereby any person will be excluded from his lands or place of residence over such road, but all such roads shall remain open for the use of the person who requires the same.

(*a*) 5 U. C. C. P. 509.

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The 13 and 14 Vic., ch. 15, vested the roads in cities and towns in the corporation. This was repealed by the 22 Vic. ch. 99, but a similar provision was contained in it (section 322), and is repeated in 36 Vic. ch 48 sec. 407, Ont., which also contains the clause (sec. 405 vesting the soil and freehold of every highway, &c., in the Queen. This apparent inconsistency may perhaps be reconciled by reading the section 405 as applying to roads laid out by public authority, and section 407 to roads laid out by private individuals. *Sarnia* v. *Great Western Railway Co.* (*a*), *Mytton* v. *Duck* (*b*). *Harrison's* Municipal Manual, page 396, g.

I must assume, I think, that the soil and freehold of all original allowances for roads, of which Division street is one, remain vested in the Crown; and that the Act incorporating the Harbour Company, not purporting to affect the Crown, did not bind it, and that the clause authorizing the Company compulsorily to take lands, is not applicable to Crown property. *Maxwell* on Statutes 113. *Re Cuckfield Board* (*c*).

Judgment.

I apprehend, therefore, that the Company's charter gave them no authority to acquire by purchase, nor to use or obstruct without purchase any original road allowance.

They are then in the same position so far as these roads are concerned as if no charter had been granted; their charter authorizes them to acquire by purchase, lands necessary for the purposes of the harbour, from private owners, but confers no right to stop up, incumber, or obstruct the highway. The public continued to have the right of reaching the water over any embankment the Company or Commissioners may have constructed; and vessels navigating the lake have

(*a*) 21 U. C. R. 59. (*b*) 26 U. C. R. 61.
(*c*) 19 Bea. 153.

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the right to land passengers, if there are conveniences for the purpose, upon any such road allowance produced. The municipality having the management and control of the roads vested in the Crown were expressly prohibited from closing them so as to prevent any private owner from having access to his property, and therefore from placing any erection thereon which would have that effect. And I see nothing in the Acts relating to the harbour conferring any such powers on the Company or the Commissioners.

It was insisted for the defendants that the 13 and 14 Vic. ch. 83 recognizes the works then erected, and sells the fee to the town council.

The Act recites that the Harbour Company had conveyed and assigned to the Board of Works the harbour and its appurtenances as a security for moneys expended or to be expended by the Government upon the harbour; that £10,500 had been expended; that the town council of Cobourg had contracted with the Government for the purchase by the town of the interests of the Government in the harbour and its appurtenances, and the Government had agreed to assign such interest and the right and title of Her Majesty to the harbour and its appurtenances for a consideration agreed upon; that the council had agreed with several stockholders for the purchase of their stock in the Company; and that the Company by not completing the harbour within the time limited by their Act of incorporation and the amendments thereto rendered themselves liable to a forfeiture of the rights, &c., conferred upon them as such Company, and to have their Act of incorporation delared void: It then proceeded to dissolve the Company and (by section 2) enacted that the harbour and all the land attached thereto, or thereafter to be attached thereto, and the moles, piers, wharves, buildings, erections, and appur-

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tenances, and all other things now vested, or being or belonging to or used with or in the said harbour, and *heretofore vested in the said Company*, &c., &c., should be, and the same were thereby vested in the municipal corporation of the town of Cobourg for ever. It seems to me that the intention of this Act was to vest in the town the right of the Government under the security it held, and any right of the Harbour Company under their charter. Not to sanction any thing that had been illegally done by the Company; not to transfer any greater right than the Company had; and certainly not to legalize, or attempt to legalize a nuisance. The Company could not give a security to the Government on property they did not own, and there was nothing in the language of their charter to grant a fee in the soil of the harbour, or to enable them to shut up highways; and this 13 and 14 Vic. sec. 83 was passed to carry out the transfer of the security to the town, and to vest in it the rights of the extinguished Company; and the language is fully satisfied by confining it to the moles, piers, buildings, &c., which had been lawfully erected. It was those only which could be considered as vested in the Company, and it is only those which had been vested in the Company which were transferred. This Act extended the limits within which tolls might be levied to between the eastern boundary of 13 to the western boundary of 21.

Judgment.

In *Marshall* v. *Ulleswater Co.* (*a*) Mr. Justice *Blackburn* says, "It is well established law that where there is a public highway the owners of land adjoining thereto have a right to go upon the highways up from any spot on their own land. * * Consequently every person in the vicinity of Lake Ulleswater whose land abuts on the edge of the lake has a right to come down to the brink

(*a*) L. R. 7 B. R. 166-172.

of the water for the purpose of going upon it to exercise the public right of navigation, which is admitted to exist."

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In that case the defendants had leased land on the shore of the lake, and were owners of steamboats navigating the lake. The plaintiff was the owner of the soil of the lake, and of a pier which had been wrongfully placed there, which prevented the defendants from landing passengers on the land leased by them, and it was held they had the right to cause their passengers to pass and repass over the pier between their boats and their land.

And in the *Eastern Counties Railway Co.* v. *Dorling* (*a*), the defendant had a right to land at a quay upon the bank of a navigable river, and the plaintiffs permanently moored their barge or dummy so as to obstruct and prevent the defendant's approach to the quay, so that it was impossible for him to land without passing over the dummy; it was held that the defendant had a right to do so.

Judgment.

These cases must undoubtedly be taken to state the law in regard to private persons, and I think the reasoning has additional force when applied to the use by the public of a public highway. The plaintiff clearly had a right to go on the highway from any part of his land, and when on it to pursue it to the water's edge. A right which, I think, has been plainly infringed by the erection of the storehouse and fence.

From the record of the proceedings of the Commissioners it appears that on the 10th May, 1875, they appointed *Dumble*, *Gravely*, and *Sutherland*, a committee to examine the warehouse "on the east pier, and see

(*a*) 5 Jur. N. S. 865, 5 C. B. N. S. 821.

1876. what is to be done." The committee reported in favour of the removal of the storehouse, and on the 12th May they were empowered to have the storehouse removed, and repairs done. On the 30th July tenders were received for the removal of the storehouse, and that of *J. Munson* accepted, and the same persons were appointed a committee to superintend the work. On the 27th September the Commissioners resolved that *Munson* having removed and repaired the storehouse on the east pier, be paid the amount of his contract. On the 4th November, when *Sutherland* was not present, it was resolved to build the fence in question, the work to be done under the superintendence of the same committee, and at the next meeting, when all the Commissioners were present, the minutes of the previous meeting were approved, and a further fence resolved to be erected. On the 10th January, 1876, the Commissioners deemed it necessary to inform the town council that they were threatened with prosecution by the plaintiff for protecting the interests of the ratepayers in the harbour property by utilizing the same; and at meetings on the 9th and 10th March, when *Guillet* had replaced *Sutherland* as an *ex officio* Commissioner, directions were given for defending this suit.

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This leaves it, without question, that all the Commissioners, including *Sutherland*, concurred in the erection of the nuisance complained of, which they seek to justify as done in the performance of a public trust, and in the execution of their statutory powers.

As I have already said, I do not think the statutes relied upon conferred any right to the road allowance on the Commissioners, and they had no right, by the erection of cribs or otherwise extending into the water and filling with earth, to exclude the public or the plaintiff from pursuing the public highway to the water's edge; that the production of the highway from

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accretion or otherwise remained a highway, and the plaintiff had a right to access to it from any portion of his land. In placing the storehouse and fence where they did they exceeded their powers.

Now, though the defendants are a public body, and wish to discharge their duty in a proper manner, if they exceed their authority, I apprehend they are liable for their acts. It is quite true that if their charter had authorized them to do these acts, they would not have been accountable for any injury individuals might suffer in consequence of them. *Boulton* v. *Crowther* (*a*), and cases cited in *Kerr* on Injunctions 242, note v., but in the absence of such authority they are just as much liable as other persons, *Attorney General* v. *Colney Hatch* (*b*); and if even in the exercise of their statutory powers they commit acts of nuisance, whether of a public or a private nature, the Court will interfere. *Box* v. *Allen* (*c*), *Attorney General* v. *Forbes* (*d*), *Kerr* on Injunctions 342–347.

Judgment.

The defendants object that *Sutherland* having ceased to be a Commissioner, ought not to be made a defendant to this suit. The bill is filed against these defendants as individuals acting in the premises without authority, not as a Board of Commissioners acting in pursuance of powers conferred on them by their charter. *Sutherland* was an active participator in the erection of the works now complained of, and if these cause a nuisance, even a clerk or agent superintending the erection would have been responsible. In *Wilson* v. *Peto* (*e*), which was an action on the case for obstructing the plaintiff's lights, the clerk who superintended the erection of the building by which they were darkened, and who alone gave directions to the work-

(*a*) 2 B. & C. 703.
(*b*) L. R. 4 Chy. 146.
(*c*) 1 Dick. 49.
(*d*) 2 M. & C. 123.
(*e*) 6 Moo. 47.

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men, was joined as a co-defendant with the original contractor; and, a verdict having been obtained against both defendants, the Court refused to grant a rule *nisi* to set aside the verdict and have a new trial. And there are many other cases to the same effect.

In *Attorney General* v. *Forbes (a)* the defendants were four gentlemen who composed a committee of the magistrates of the county of Berks, and the surveyor of the county, and three other persons whom the magistrates had authorized to proceed in the repair and reconstruction of a bridge over the river Thames; and demurrers by the surveyor and contractors were overruled, as they were all so mixed up and identified with the proceedings of the magistrates that they were properly made parties.

I apprehend that this bill would have been sustainable against the committee alone, but the plaintiff had the option of making all the Commissioners who authorized the work parties; and that the fact of *Sutherland* having ceased to be a Commissioner is of no importance. And as *Guillet,* the successor of *Sutherland* at the Board, was not a member of it while the acts complained of were done he could not be made liable for the creation of the nuisance. He might perhaps be liable for maintaining the nuisance. But the plaintiff is not bound to join all the parties, who may contribute to the injury, he may sue one or more of them at his election. *Add.* on Torts, 198. And there is no contribution between wrongdoers,—*Ib.* 996. The same rule applies in this Court: *Devaynes* v. *Robinson* (*b*). The subject of the liability of trustees for the acts of their servants, and of the liability of the trust property for the acts of the trustees was much discussed in *The Mersey Docks Trustees* v. *Gibbs* (*c*). In *Duncan* v.

Judgment.

(*a*) 2 M. & C. 123.

(*b*) 24 Beav. at 97.

(*c*) L. R. 1 H. L. 93.

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Frindlater (*a*), Lord *Cottenham* had said that "if the thing done is not within the Statute, either from the party doing it having exceeded the powers conferred on him by Statute, or from the manner in which he has thought fit to perform the work, why should the public be liable to make good his private error or misconduct."

Lord *Westbury* in *The Mersey Docks* Case, inverted this proposition, and held that the person suffering damage was not forced to seek a remedy against the individuals, but might proceed against the corporation and render the trust funds liable.

Covert and *Hargraft*, to whom the plaintiff has mortgaged his property, consent to be made parties and bound by the decree.

I think the plaintiff entitled to the relief he asks, and a mandatory injunction will therefore issue against the defendants other than *The Attorney General* for the removal of the nuisance.

Judgment.

The plaintiff also asks for damages. Formerly the Court would have been powerless to give damages, but under the 28 Vic. ch. 17 sec. 3, and more particularly under the Administration of Justice Act, the Court is bound to give full relief in any suit that may be brought before it, and is not at liberty to send the plaintiff to law to obtain his damages. There will therefore be an inquiry as to them. And the decree must be with costs. The placing of the buildings and the fence was done in defiance of the protestations of the plaintiff, and the suit has been defended in asserting a right to which I think the defendants not entitled.

(*a*) 6 Cl. & F. 894.

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In Re Gilchrist—Bohn v. Fyfe.

Will, construction of—Legacies—Mixed fund.

A testator by his will bequeathed certain legacies of different amounts to his sons and daughters, and directed his "real and personal property" to be sold by auction, and then added, "And the household furniture also to be sold by auction, and the proceeds of the sale to be equally divided amongst my daughters."

Held, that the legacies to the sons and daughters were payable out of the mixed fund of real and personal estate.

This was an administration suit, and in drawing the decree a question arose as to the proper directions to be given as to the payment of legacies, and the question was spoken to on a motion to vary the minutes.

Mr. *J. Bain*, for the plaintiff.

Mr. *John Paterson*, for the defendants. The matter in question clearly appears in the head note and judgment of

Spragge, C.—There seems to be no way of making the testator's will consistent with itself except by holding that his meaning and intention were to make his real and personal estate a mixed fund out of which his legacies were to be paid. He appears to deal differently with his household furniture than with his other personalty. After directing his "real and personal property" to be sold by auction, he adds, "and the household furniture also to be sold by auction and the proceeds of the sale to be *equally* divided amongst my daughters." His legacies are in *unequal* amounts to sons and daughters. He could not, therefore, have intended his legacies to be paid out of the proceeds of the sale of his furniture; and there is no other fund out of which the legacies are to be paid, except the mixed fund of real and personal estate; they are, in my opinion, payable out of that fund.

Judgment.

It appears by the affidavit put in of *Catharine Bohn* that all the parties interested in the will have been notified.

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KERR v. READ.

Legacy to wife—Receipt by husband of wife's money—Gift inter vivos —Fraudulent assignment—Parol evidence controuling writing.

Before 1859 a husband received a sum of money bequeathed to his wife, upon receipt of which he made an entry in an account book indicating what the money was and the source from which he had received it; he mixed this money with his own, using it in the erection of buildings upon land seemingly his own, but treating the money as money to the usufruct of which his wife was entitled. In 1863 one of his sons, *W.*, was indebted to him in an amount about equal to such legacy, and with a view of accounting to her for such legacy, and with her assent, he made entries in his books transferring such indebtedness of *W.* to his wife:

Held, that the transfer of the son's debt was a good gift *inter vivos* from the husband to his wife.

A widow, by writing duly signed, sealed and attested, released to her son *W.* a sum of $14,477.95, "standing to my account in my son *William's* books at this date, and which I intended to give him; I hereby give it to him and release him from all claim in respect thereof." *W.* subsequently went into a somewhat hazardous business, and afterwards becoming insolvent made an assignment under the Insolvent Acts. In a suit instituted by the Official Assignee claiming this money for *W.'s* creditors, the Court allowed parol evidence to be given, shewing that such release, though absolute in form, was, as to one-half of the amount transferred, intended to create a trust in favour of another son, *A.*, his wife and children; and the Court being satisfied of the truthfulness of such evidence, refused the relief asked, and dismissed the bill with costs.

Statement.

The circumstances giving rise to this suit sufficiently appear in the head note and judgment, and are more fully set out in the report of the case on demurrer before Vice-Chancellor *Proudfoot*, ante volume xxii., page 529. After the decision there reported the plaintiff amended his bill, and the cause having been put at issue, was brought on for hearing at the sittings at Toronto, held in November, 1875, when witnesses were examined. The effect of the evidence given is stated in the judgment.

Mr. *Attorney-General Mowat* and Mr. *Bain*, for the

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plaintiff. The defence here fails when the parties fail to establish the consideration for the debt alleged to be due by *J. G. Chewitt* to his wife. It is not suggested that the document in question was put in the shape it is by mistake or accident; and if parol evidence can, under any circumstances, be received to impeach a written instrument it must be of the strongest kind, or, as some learned Judges have expressed it, must be irrefragable in its character. Here we have Mr. *W. Chewitt* a shrewd, intelligent man of business, and of considerable experience, receiving from his mother a release of his indebtedness to her which he draws up in his own handwriting, in words which he considered necessary to effectuate the purpose in view, and which would appear from the language of the memorandum signed by Mrs. *Chewitt* to have been an absolute assignment to *William Chewitt.* It is now alleged that every document evidencing the dealings between these parties, including that impeached in this suit, does not express the true intentions of the parties, and what is now relied upon as evidence to vary these documents are merely family conversations, which it is submitted will never be accepted as sufficient to vary or control a written instrument. These instruments were signed a long time ago, and any recollection of, and statements with regard to conversations, said to have taken place amongst the members of the family, cannot be looked upon as reliable or entitled to much consideration when opposed to these writings. The whole ground of defence rests upon proving, as a fact, that the $14,000 was Mrs. *Chewitt's*, and was hers to dispose of as she might see fit at the date of these transactions, at which time it must be borne in mind that several other writings were executed that could not, under any circumstances, have been maintained against creditors.

Argument.

Mr. *Attorney-General Blake* and Mr. *Moss*, for the defendants. The books prove that there was a debt

by *J. G. Chewitt* to his wife, and that *William C. Chewitt* owed his father. If there was a debt due, the Master's report, in the case of *Torrance* v. *Chewitt*, found that Mrs. *Chewitt* was the person properly entitled thereto. Then this money is shewn to have been expended in the erection of a house which went to the estate, and the creditors derived the benefit thereof; not content with that they now seek to obtain the debt itself, by which means they would, in fact, receive the amount twice over. Then the agreement was sworn to as long ago as March, 1865, therefore it cannot be a concocted story to meet the present claim. The bill does not allege that the transactions now sought to be impeached were entered upon with the view of benefiting the family of *William Chewitt* in any way, but the settlement was made because he was about to enter into a hazardous business, and it was desirable to shew what the true nature of his interest in these moneys was, and secure the interest of *Alexander Chewitt* therein to his family; the probabilities are against the contention now made by the plaintiff, that *William Chewitt* would have given so large an item out of his assets and placed it completely beyond his control in case he should ever require the money: and if he had desired to perpetrate a fraud on his creditors or protect himself against future liabilities he would never have drawn up the memorandum signed by his mother in the terms used in it, and which it is now shewn does not express the real state of facts in relation to the transaction, which often is the case where the utmost good faith exists in the matter, particularly when documents are prepared by the parties themselves. Then the circumstances connected with the deed to *Read* were intelligible enough. At the time Mrs. *Chewitt* signed the memorandum it was desirable that no share should appear to have been given in the money to *Alexander Chewitt* by reason of the claim asserted by *Torrance*, but his suit having been arranged in April, 1867, it was a fitting time to give instructions in respect

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Argument.

1876. to the deed of December, 1867, and it is shewn that instructions for that instrument were given some months before it was prepared.

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The cases cited are mentioned in the judgment.

SPRAGGE, C.—The question whether the conveyance to *Read* is impeachable as void under the statute of Elizabeth, only becomes material in the event of the property conveyed (which is personalty) being in truth the property of the insolvent *William C. Chewitt*. Apart from that the question is between the plaintiff as assignee of *William* and the *cestuis que trust* under the impeached deed—the wife and children of *Alexander C. Chewitt*.

Some points are clear. One is, that the $14,000 (in round numbers) which is referred to in the document of 2nd March, 1863, was treated both before and after the death of the father *James G. Chewitt*, as the separate property of the mother—certainly by the mother of *William* after the death of the father and by the father himself before his death. But it is contended that this property was in law the property of the husband; that it was so when he received it, and that it continued so to his death, and came under the general dispositions made by his will. If it were so, *William* owed that $14,000 to the estate instead of to his mother, and was entitled to one-fourth of it, or some proportion.

Judgment.

Under the old law, before the Married Woman's Act, these moneys would upon reaching the hands of the husband, and without any special appropriation by him, become by operation of law the property of the husband —*primâ facie*. that would be the case. The husband upon receiving them made an entry in an account book denoting that they were moneys bequeathed to his wife by her grandfather. I doubt if these entries were any

thing more than descriptive of the moneys, designating the quarter from which they were derived. I doubt if they intercepted or affected his marital right—not entered in any account *between himself and his wife.* Then his subsequent dealings with these moneys, using them along with moneys of his own in the erection of buildings—upon land seemingly his own—but treating them as moneys to the usufruct of which his wife was entitled still it might be entitled morally rather than legally. Then came the dealing arising out of the indebtedness of *William* to himself. He, with the assent of his wife, transfers that indebtedness of *William* from himself to his wife, and avowedly does so on the ground that he has so much money of hers in his hands. What is the character of that dealing? Is it a gift *inter vivos*, or does it give a character by relation to the original receipt of the money negativing the presumption that he received it in virtue of his marital right?

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I incline to think there was a gift *inter vivos*, *i.e.*, assuming these moneys to have become his, the husband's, in virtue of his marital right upon reaching his hands. There is a case of *Powell* v. *Cleaver* (*a*), in which it was one among several questions whether there had been a gift *inter vivos*, and entries in the books of the testator were relied upon: Counsel say, in argument "Here I rely on the entries in Mr. *Powell's* hand-writing;" and Lord *Thurlow* said "There are entries in the books of *Powell* by which it appears that he had made a calculation of the sums advanced as a portion."

Judgment.

The case of *George* v. *Howard* (*b*), in the Exchequer, resembles this case very much in more than one of its features.

The head note to that case is as follows: "A trans-

(*a*) 2 B. C. C. 500. (*b*) 7 Price 646.

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fer of stock of an intestate into the name of himself jointly with that of the husband of one of his two nieces, accompanied by proof of his having said in his lifetime that it was his intention to give the husband the stock at his death, in consideration of affection for him and his wife, and that he had transferred it for that purpose (if not repelled by counter testimony), held to be sufficient proof of a gift of stock. And the Court will not continue an injunction granted to restrain the husband (who had administered) from disposing of it. Such evidence is strong enough to destroy the equitable presumption, that the transferee is a mere trustee for the transferror, without the aid of a reference or an issue; for, however weak the defendant's equity may be in such a case, yet where the plaintiff does not shew any, slight circumstances are sufficient to rebut the *primâ facie* presumption." And in disposing of that case the Lord Chief Baron, in delivering judgment says: "The case of *Rider* v. *Kidder* (*a*) does not apply. That case was argued on this ground, that the intestate having purchased the stock with his own money and transferred it into his own name and that of another person, the presumption is, that the other person, if a stranger, is merely a trustee for him whose money it was; and so it might be presumed here, perhaps, if such were the fact, but in this case stock already purchased and invested was transferred into the name of the owner and the defendant; and if I deliver over money, or transfer stock to another even although he should be a stranger it would be *prima facie* a gift. This is a much stronger case than a transfer to a mere stranger, and it lies upon the party denying it to be a gift to shew some reason for a Court decreeing it to be a trust. Here the mere presumption on which the plaintiffs rely is rebutted by evidence explaining the purpose and

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(*a*) 10 Ves. 360.

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object of the transfer, and there is no evidence offered on the other side to contradict it. As to the objection that this is an odd mode of making a gift, and therefore could not have been intended, that is still nothing more than presumption, and it is answered by the evidence. It certainly was not the best mode, or one which a man of more skill would have adopted in making a gift; but when we have evidence of a reasonable motive for it in the giver's regard for his niece, and approbation of her husband's conduct towards her, that is sufficient to check any interference on our part to take the stock from the defendant."

Lucas v. *Lucas* (*a*), is also an important case; and it is observed of it by the Master of Rolls in *Walter* v. *Hodge* (*b*), "In the single case of £1,000 South Sea annuities, transferred by the husband into the name of his wife in his life-time, the Court thought that so decisive an act as amounted to an agreement by the husband that the property should become hers. That seems to come under the description stated by Lord *Alvanley*, it is an act, a clear and distinct act, by which the husband divested himself of his property." There is also an old case in *Strange's* Reports, *Smith* v. *Smith* (*c*), but it is in its circumstances less like the case before me, than the cases I have quoted.

Judgment.

The Attorney-General mentioned that there was a case in 1 Hare. The case is *McFadden* v. *Jenkyns* (*d*), and was affirmed by Lord *Cottenham* (*e*), who in disposing of the appeal remarked, "Some points were disposed of by the Vice Chancellor in this case, which are indeed free from doubt, and appear not to have been contested in this Court, viz., that a declaration by

(*a*) 1 Atk. 270.
(*b*) 2 Swans. 106.
(*c*) 2 Str 955.
(*d*) 1 Hare 458.
(*e*) 1 Ph. 153.

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parol is sufficient to create a trust of personal property; and that if the testator *Thomas Warry* had, in his life-time, declared himself a trustee of the defendant for the plaintiff that, in equity, would perfect the gift to the plaintiff as against *Thomas Warry* and his estate. The distinctions upon this subject are undoubtedly refined, but it does not appear to me that there is any substantial difference between such a case and the present. The testator, in directing *Jenkyns* to hold the money in trust for the plaintiff, which was assented to and acted upon by *Jenkyns*, impressed, I think, a trust upon the money which was complete and irrevocable."

My conclusion is, that there was a good gift *inter vivos* from the husband to his wife of the moneys bequeathed to her which came to his hands.

The main question then arises. I agree that all dealings with property which upon the face of the title, so to call it, has belonged to one who afterwards becomes insolvent, and especially where these dealings are among relations, should be scrutinized with jealous care; and that when parol evidence is given to shew that instruments were not intended to mean what upon their face they import, that evidence should be received with extreme caution, and ought to be very cogent and convincing before it is allowed to outweigh and override the ordinary meaning of written instruments.

Judgment.

Still we find it the case in not a few instances, and the evidence is convincing to us that it is the case, that the true agreement of parties is not expressed in the writings which are entered into between parties.

The plaintiff's case is, that the short paper of 2nd March, 1863, was intended to be, what it purports to be, a gift from the mother to *William*, of the sum in which he stood indebted to her, and that the change by

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the pencil memorandum of 9th October, 1865, (assuming that to be the true date, which is questioned), was made in order to withdraw from the reach of prospective creditors the one-half of that fund, *William* being intended to be beneficially entitled to the whole of it. On the other hand, the defendants' contention is, that *William* received that paper, upon a condition that as to half of it he took it as a trustee for *Alexander* ; and that is really the issue between the parties—not between *William* and his creditors, but between those creditors and the family who claim to be *cestuis que trust* under what the defendants allege to have been the real agreement between *William* and his mother. The original document is distinct and explicit enough in its terms. " As regards the sum of $14,447.95 standing to my account in my son *William's* books at this date, and which I intended to give him, I hereby give it to him, and release him from all claim in respect thereof ;" and the paper has in addition to the mother's signature the formality of a seal and of attestation by a witness.

Judgment.

Some reasons are suggested why, although the true agreement was as alleged, that *William* should take only half beneficially and hold the other half for the benefit of *Alexander*, it was not so expressed.—One: the *Torrance* litigation and the desire that the *Torrances* should not be informed of the true agreement. This is not perhaps a sound reason, still it is one thing to forgive a debt, and another to make a present to one of two children, and not to the other. The other reason : the then condition of *Alexander's* pecuniary affairs. This also is not very weighty, for the paper might have been kept in the hands of the parties. The argument, and it has force in it, is, that in the absence of any sound reason why the paper should not express the true agreement, it ought to be taken to express the true agreement. I agree to this extent, that in such a case the evidence of the true agreement being different

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from the agreement expressed must be all the stronger. It must be a question of weight of evidence, and we know by experience that agreements are not unfrequently put in a shape not expressing the *true* agreement, and that without any reason or with only insufficient, unsatisfactory reasons being given for it. We know, too, that what may appear to us unsatisfactory reasons will appear often to parties to instruments quite sufficient.

The memorandum made by *William* at the foot of this paper, and dated 9th October, 1865, is a weighty piece of evidence, if made at the time it bears date. It is questioned whether that is the true date. It is suggested that the date has the appearance of having been added afterwards. If so the memorandum was originally without date, for the date on the paper is certainly not an *altered* date. If it is a false date put there to answer a sinister purpose would it not have been made of an earlier date, probably that of the instrument, or the date left blank? The suggestion, I suppose, is, that this memorandum was really made on the eve of *William* entering into business, and was part of a scheme to withdraw so much from the reach of prospective creditors Upon this question of date we have the evidence of *William* himself corroborated by that of his mother and by other circumstances, and I cannot say that the appearance of the paper indicates that the date was not inserted at the time.

Judgment.

It certainly detracts from the value of this memorandum that the statements contained in it are not true.

What it professes to describe is misstated. The explanation offered of this, being a change of agreement in the meantime. This is intelligible though not entirely satisfactory. If the 9th October be the true date, would it serve any object to state at that date that he was beneficially entitled only to half unless he really were so?

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It was proper to state in writing his true position whatever it was, *e. g.*, he might die, and *Alexander* and his wife and children might find it difficult to prove themselves beneficially interested. The next document in order is that of April, 1865, drawn by Mr. *Read*, and which he says was drawn to answer a temporary purpose, and did not express, and was not intended to express the true arrangement between the parties. A valuable consideration is expressed in it, that of $400 a year to be paid by *Willian*. It is sworn both by *William* and Mr. *Read* that no such payment was intended to be made. Its effect was to vest in *William C. Chewitt* the share of *Alexander* in the one-fourth part of the estate of the father divisible between the two brothers upon the death of the widow.

Judgment.

The defendants' contention is, that the position of *William* was that, taking no beneficial interest under that instrument, he was a trustee for the whole of the quarter dealt with by that instrument for *Alexander's* wife and children, as to one-half under the substituted agreement of 9th October, 1865, and as to the other half under the instrument of April, 1865, and that the trust deed to Mr. *Read* impeached in this suit, was only a carrying out of what *William* was bound to do as such trustee.

The short question then is, whether at the date of that deed *William* was entitled beneficially to the one-half of the share under his father's will, which is dealt with by that deed.

Upon this the chief evidence, besides the documentary evidence, is that of *Willian* himself and of his mother. There is also the evidence of the wife of *William* and the evidence of *Alexander* and of Mr. *Read*. The evidence of all of these witnesses appeared to me to be given ingenuously and truthfully, and that of *William*

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Chewitt and his mother with great clearness. I believe that they spoke the truth; and the truthfulness of the mother's statement is confirmed by this, that in the evidence given by her in the *Torrance* suit on the 23rd of March, 1865, after stating the arrangement by which *William's* debt to his father was transferred to her, *William* thereby becoming her debtor, she stated that *William* had arranged it with her by agreeing to settle the amount on *Alexander's* wife and children. She says now that she did give that evidence at the time. The significance of this is that at the time that evidence was given there could be no motive for her to state that this arrangment and agreement had been made between herself and *William* unless the fact were so.

And at that date. and at the date of the pencil memorandum, there could be no possible motive for *William* to state untruly against his own interest that the half of the share in question was not his own but held by him in trust for another.

Judgment.

At the *date* of the impeached deed, *William Chewitt* contemplated engaging in business, which may well be described as speculative and hazardous; and if this had been a settlement of his own property, in favor of his own wife and children, it might well be open to question. I should probably think of it, as I thought of the settlement in *Buckland* v. *Rose*, (*a*). But, instructions for this deed were given some six months before. Whether the entering into this business was contemplated at that time seems very doubtful. But however that may be, it has a material bearing upon the question, whether the property settled was the property of *William* or not, to consider whether any rational man of business would settle *his own* property as this was settled. If disaster in business had actually overtaken him, he might prefer his brother's family to his creditors, but would scarcely

(*a*) 7 Gr. 440.

prefer them to his own family, though that might be possible as to a portion of his fortune. What I am asked to find here is, that he did this to provide against a contingency, and that he placed this portion of his property not only out of the reach of prospective creditors, but out of his own reach, and out of the reach of his own wife and children; not upon a secret trust in hands which might restore it to him, but in hands which could in no event restore it to him. I have not myself met with any instance of a man so dealing with his property, nor have I in the books seen any such. The conveyance made is perfectly consistent with the property not being his own beneficially, but held by him for those who are the objects of the trust; but so unlike the ordinary dealings of men, that we may say with almost certainty, that it is not consistent with the property being his own, and his object in making it being to defeat prospective creditors.

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I agree with the Attorney-General in much that he has said. The question is, whether the difficulties which are created by some of the documentary evidence are overcome. The difficulties are serious, but the documentary evidence is not all one way. If it be a correct conclusion that the memorandum of 9th October, 1865, was made at the date it bears, it goes very far to remove the difficulties created by other documents, but I cannot help saying that the document of April, 1865, and the impeached deed may be said almost to invite critical investigation, the former full of fictions, and the latter, while containing several formal recitals, does not state what is contended to be, and what I believe to be, the true reason and consideration for making the deed, but states only the desire of the settlor *William* to convey the property to a trustee for the benefit of his brother and his brother's wife and children, the import of which to any person reading it is, that it was his own to deal with as he pleased.

Judgment.

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My conclusion is, that the defence is established, that *William* had no beneficial interest in the property which was the subject of the deed in trust made to Mr. *Read*, and that the bill must be dismissed. I have hesitated whether I should not dismiss it *without* costs by reason of the suspicions naturally arising out of the form and contents of the instrument upon which I have commented, but upon consideration I think I ought not to do this. *Alexander Chewitt* and his wife are not, and their children cannot be, directly responsible for the form and contents of these instruments. It is no fault of theirs that they are as they are; *Alexander*, perhaps, if vigilant and business-like might have required their correction. But, again, they are not plaintiffs but defendants; and I ought not, unless for stronger reasons than exist in this case, to deprive defendants of costs incurred by them in resisting demands which are not established against them in evidence. The costs, therefore, will, as is the general rule, follow the result.

Judgment.

Switzer v. McMillan.

Guardian of infants—Lease.

The guardian of infants cannot give a lease of their estate; such lease is void *ab initio*, unless the sanction of the Court has been obtained thereto.

This was an appeal from the ruling of the Master at Guelph, who had found that a lease made by the statutory guardian (the mother) of the infants was binding on their interests, and that although during the currency of the lease some of the infants had attained majority.

Mr. *W. Cassels*, for the appeal, referred to *Whitney* v. *Leyden*, before *Strong*, V. C., in 1872, and *Smith* v. *Smith* before *Blake*, V. C., where in each case it had been decided that such a lease was void. But even if it

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were good during the minority of the infants, here the lease was for eight years, during which time several of the infants will come of age, and *Simpson* on Infancy, page 335, lays it down that a guardian cannot make a valid lease to extend beyond the infancy of the heir.

Mr. *Small*, for the lessee, contra, referred to *Bingham* on Infants, page 151, to shew that a lease by guardians was good though extending beyond minority of some of the infants, unless repudiated by the wards, on attaining twenty-one. [*Proudfoot*, V. C., can it be good as to part and void as to part?] The Master finds she is the guardian of the infants, and, therefore, the lease is good during the minority of the other wards : *Woodfall*, page 12, lays it down that the lessee of a joint tenant is entitled to hold. *Worthington* v. *Weston* (*a*), is contra, but *Woodfall*, at page 46, speaks doubtfully of this authority. In any event, however, the lessee should not be ordered to pay costs.

Judgment.

PROUDFOOT, V. C.—The appeal in this case is because the Master has certified that a lease made by the statutory guardian of some children of their estate is binding upon those of the children who are still infants.

The question is no longer open for discussion before me, as *Strong*, V. C., in *Whitney* v. *Leyden*, (25th September, 1872, not reported) has determined that such a guardian has no power to lease without the sanction of the Court. This case was followed by *Blake*, V. C., in *Smith* v. *Smith*, (on the 12th May, 1873, not reported.) *

The appeal is allowed with costs.

(*a*) 2 Wil. 232.

* See also *Townsley* v. *Neal*, 10 Gr., where *VanKoughnet*, C., at page 73, says, "I have no reason to doubt that *Dobson* and *Gibbs* acted in good faith in the matter of the lease, though it is and was void *ab initio*. The guardian executed it without any authority," &c., &c.

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LITTLE v. WALLACEBURGH.

Town councillors—Right to change site of public buildings—By-law.

This Court has not the power of restraining councillors of an incorporated village, in the due exercise of their constitutional power, from changing the site of a proposed town hall and market, although the site first selected had been acquired by the corporation for the purpose, it not being shewn that any change of circumstances had been made by parties on the faith of it, or that any corrupt or improper motive actuated the members of the council in making such change.

A by-law to raise money wherewith to build a town hall and market approved of by the vote of the ratepayers, did not specify any site on which the buildings were to be erected:

Held, that this left the councillors unfettered in their choice of site, although at the time there was a resolution on the minutes of the council adopting a particular one, and which had been purchased by and conveyed to the corporation for the purpose.

Statement.

This was a motion for injunction under the following circumstances:—The village of Wallaceburg being desirous of having a Town Hall, and having about $2,000 belonging to the Municipality—$1,800 from the Municipal Loan Fund and $250 from the sale to a school section of a building—passed a by-law in March, 1876, and submitted it to the ratepayers, who approved it, for raising $4,000, with which, and the $2,000, they intended to pay for the site and for the erection of the building.

As to the $1,800, there was no question that it became the property of the municipality not appropriated to any specific site. The $250 seemed to have belonged to the inhabitants of the village prior to incorporation, and at a meeting duly convened it was determined to invest it in the purchase of a site for a town hall and market ground, and three persons were appointed trustees to invest the sum in such purchase.

In pursuance of this trust the trustees on the 6th of

February, 1874, procured from one *Martin* a bond, that as soon as the village became incorporated he would convey the lands known as the *Martin* site to the corporation. The trustees paid to *Martin* the $250. 1876. Little v. Wallaceburg

In June, 1875, the village Council passed a by-law appropriating the said $1,800, for the purchase of a site whereon to erect a town hall and establish a market.

Afterwards a majority of the then Council determined to select another site known as the *Duggan, Scott & Smith* site, influenced thereto, as it was alleged, by the corrupt motive of enhancing the value of their own property that lay in the vicinity.

Some of the ratepayers in November, 1875, obtained an injunction preventing the purchase of the *Duggan, Scott & Smith* site, when the defendants abandoned the plan, and paid the costs of the suit.

tatement.

On the 4th of December, 1875, a resolution was passed adopting the *Martin* site for the town hall, and on the 6th of December a deed was obtained for it. In the spring of 1876, contracts were entered into for the purchase of materials and for their delivery on the *Martin* site.

A number of the ratepayers, nearly one-half, (108) who, though dissatisfied with the *Duggan, Scott & Smith* site, were not pleased with the *Martin* site, petitioned the Council to erect the town hall on another plot known as the *Baby* site.

When this petition was discussed on the 11th of July last, a motion in accordance with its prayer was negatived, and an amendment carried to reconvey to *Martin* his lot on his refunding the money paid him, and that the property offered by *John McGregor* on the south

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side of the river should be accepted, "and that the present building committee proceed at once to let the contract for the erection of a hall thereon."

McGregor offered this last site as a gift. A majority only of the Council voted for the amendment.

The building committee proceeded under the resolution, and some progress had been made in the erection of the hall.

A like number of ratepayers (108) had petitioned against the *McGregor* site.

The larger portion of the village lies on the north side of the river, about 200 of the ratepayers residing there, while on the south side there are only 76 ; and the assessed value of the property on the north side is $109,260, and on the south side is $31,425.

Statement.

It was alleged that the defendants, the Councillors, in voting for the *McGregor* site were influenced by motives of self interest, with the corrupt view of increasing the value of their property.

It was also alleged that the vote of the ratepayers was obtained on the understanding that the money was to be expended on the *Martin* lot, and that it was not in the power of a majority of the Council, in opposition to the minority and a majority of the ratepayers, to alter or change the site.

The bill charged that a number of persons had purchased lands near the *Martin* site, and made improvements upon the faith of the site having been dedicated by the corporation for the purpose of a town hall and market.

The injunction asked was, to restrain the defendants from changing the site for a town hall and market from

the *Martin* to the *McGregor* site, and from acquiring the *McGregor* site, and from removing the materials from the *Martin* site, and from erecting the hall on the *McGregor* site. 1876. Little v. Wallaceburg

Mr. *Bethune*, Q. C., and Mr. *Moss*, in support of the application.

Mr. *Boyd*, Q. C., contra.

The points discussed sufficiently appear in the judgment.

PROUDFOOT, V. C.—There is no evidence of any purchases having been made on the faith of the dedication of the *Martin* site, and the injunction cannot be granted on that ground. Nor do I think the affidavits establish any corrupt or selfish motives on the part of the defendants. *Langstaffe*, one of them, has no property on the south side of the river; and another, *Steinhoff*, though he resides on the south side, has the largest part of his property on the north side. *McDougall*, indeed, resides on the south side, but his property, he swears, is not for sale, and that if it were increased in value it would only subject him to a heavier assessment, and that he is not influenced by the motives charged against him. Sept. 25th. Judgment.

From the plan which has been shewn to me it appears that the *McGregor* site is on a leading thoroughfare and near the bridge across the river, and to a large number of the residents on the north side must be more convenient than the *Martin* site.

To judge from the affidavits which have been read to me, of twenty-three persons for the plaintiffs and of forty-five for the defendants, I think the *McGregor* site much the better of the two; and though the opinion of the ratepayers is much divided it would probably receive

1876. a larger number of votes. But I apprehend that the villagers, in the exercise of their new municipal powers, would be more apt to vote against any particular site, than in favour of one. Every voter would naturally desire the money spent where it would most benefit himself. Thus we have 108 persons asking the *Martin* site to be changed for the *Baby* site, and another 108 petitioning against the *McGregor* site.

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However, if the Councillors choose to run the risk of going contrary to the wishes of the majority, I do not think this Court has the power to restrain them, in the due exercise of their constitutional powers. There does not seem to me to be any corrupt or improper motive actuating these Councillors, and I can only inquire if they have the power, and if they have legally exercised it, to do what they have done.

It is charged that the vote on the by-law was obtained on the understanding that the money was to be spent on the *Martin* lot, and an attempt was made to connect the defendants with representations to that effect. Some of the ratepayers were so told by the town clerk on the day of the poll, but the defendants are not connected with this; and the defendant *McDougall* is said in conversation, two or three days before, to have told a ratepayer to the same effect. But it seems to have been a casual conversation, and the statement not made for the purpose of influencing a vote. No doubt there was then a resolution on the minutes of the Council adopting the *Martin* site, but the Council had the power of altering it. No site is specified in the by-law, which of itself would be notice that the Councillors were unfettered. I do not think it established that the general vote was based on the notion of an unalterable determination in favor of the *Martin* site.

Judgment.

It was pressed by Mr. *Moss*, not, as stated in the bill,

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that the corporation had dedicated the *Martin* site for the purpose, but that the owners of the $250 invested in the *Martin* site had dedicated it, that it was affected by a trust, and that the Council could not divert it from that purpose. And if it were established that a donor had given the property for that purpose, it may not be in the power of the municipality to alien it: *Dillon*, sec. 512, *et seq.* It does not seem to me that this fund is brought within the operation of that rule. The money belonged to the inhabitants of the village, but, not then being incorporated, it was placed in the hands of trustees to invest in a market site. An investment so made ought not, in my opinion, to have any greater effect as a dedication than if made by the corporation with its corporate funds. It was made by the inhabitants in their individual capacity for their benefit when incorporated. The powers they possessed as individuals over this fund then passed to the corporation. And if, as I apprehend they might have done, the individual voters had chosen to rescind their vote, there was no such trust imposed on it as could have prevented it; and so, I think, if the corporation buys property for the site of a town hall, and no change of circumstances is made on the faith of it, the same body may, before building, at all events, change the site.

Judgment.

But supposing the *Martin* lot to be affected by such a trust, it may prevent its being used for any other purpose, and from being alienated; but I see nothing to compel the municipality to spend a large sum in the erection of buildings on an unsuitable site, nothing to control their power of acquiring the best situation for the purpose.

The case made by the bill of a dedication by the municipality itself, could only have an influence, if at all, if purchases had been made on the faith of it, of which there is no evidence. Otherwise I see nothing to

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prevent the municipality from changing or abandoning their markets and halls (*a*).

It was also argued, that having adopted the *Martin* site it could not be changed without a by-law. But the *Martin* site was adopted only by a resolution, and by another resolution the *McGregor* site was chosen. I do not think a by-law necessary for either purpose, beyond the by-law for raising the money. That impliedly embodied all necessary authority to the Councillors to carry it into effect. This motion does not seek to restrain the defendants from disposing of the *Martin* lot, and I need not discuss, at this stage of the cause, the authority of the Council to dispose of the property when no longer required for the purpose for which it was bought, nor when a by-law is necessary to enable the municipality to dispose of its property.

Judgment.

Another reason why the injunction is asked is, that the title to the *McGregor* lot is defective. It is denied by the other side. I do not know how it is. No defect was pointed out, and I cannot assume the defendants are going to spend $6,000 on property to which they have no title.

The injunction is refused, with costs.

(*a*) Dill. 315, 498.

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GILLELAND v. WADSWORTH.

Mortgagor and mortgagee—Assignment—Notice—Payments on mortgage—Registration.

The rule is well settled that payments made by a mortgagor to a mortgagee in ignorance of an assignment are good payments upon a mortgage against an assignee.

B. being the owner of Whiteacre, mortgaged the same to *C.*, who sold and assigned the security to J., which assignment was duly registered, and afterwards *B.* agreed with *W.*, the owner of Blackacre, to effect an exchange of properties, *B.* agreeing to have the mortgage which he had executed to *C.* transferred from Whiteacre to Blackacre, which *C.* assented to, and the arrangement was finally carried out in the manner proposed, *C.* who was a solicitor, being the party employed to prepare the several conveyances, including the mortgage from *B.* to himself upon the newly acquired property (Blackacre). No mention was made of the first mortgage by either party on this occasion, and *B.* continued to pay *C.* the interest and ultimately the principal, when he obtained a discharge of the mortgage on Blackacre; *C.* all the while continuing to pay *J.* the interest accruing due upon the mortgage on Whiteacre:

Held, (1) that the payments so made by *B.* to *C.* had the effect of discharging the mortgage on Whiteacre, and that the assignee thereof could not enforce it against *W.*; and (2) that *W.* and *B.* were not affected with notice of the transfer of the mortgage by reason of the registration thereof.

In such a case the fact of registration was not set up by the bill, and the Court at the hearing, considering that an amendment for the purpose would not be in furtherance of justice, refused the plaintiff liberty to make the necessary amendment.

Statement.

One *Brown*, being the owner of lot *A*, by mortgage of 26th of September, 1862, mortgaged the same to one *Currie* to secure payment of $900; and *Currie* by indenture of 3rd of November in the same year, assigned the same for the same sum to one *Junkin* *Currie* covenanting with *Junkin* for the payment of the mortgage money. The assignment of the mortgage was through an agent of the assignee, who, as he stated in his evidence, relied upon the covenant. He did not give notice of the assignment to the mortgagor.

At a later date, 7th December, 1863, *Brown* and

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the defendant *Wadsworth*, who was the owner of lot *B*, agreed to make an even exchange of their respective lots. *Wadsworth* was informed by *Brown* of the mortgage to *Currie*, and *Brown* agreed that he would procure the mortgage to be transferred from lot *A* to lot *B*. *Currie* assented to this, and the arrangement was carried out by conveyances between the parties, *Brown* conveying lot *A* to *Wadsworth* and *Wadsworth* conveying lot *B* to *Brown*, and a mortgage from *Brown* to *Currie* for the same amount, $900, payable at the same time and upon the same terms, was given on lot *B* as had been given on lot *A*. All this was done in the office of *Currie*, and the papers were left with him for registration. The assignment from *Currie* to *Junkin* was by the former not disclosed to the parties. They assumed that he was still holder of the mortgage on lot *A*, but omitted to obtain from him a release or discharge of it.

Statement.

Brown continued to pay the interest to *Currie*, and eventually paid off the principal and obtained a discharge, *Currie* at the same time paying the interest on the assigned mortgage to *Junkin* up to 1st of October, 1874, when he ceased to pay interest; and *Junkin* then for the first time notified *Wadsworth*, never having notified *Brown*, of the assignment to himself of the mortgage on lot *A*. No part of the principal money secured by the mortgage was paid by *Currie* to *Junkin*.

The cause came on for hearing at the sittings of the Court in St. Catharines, in March, 1876.

Mr. *McMichael*, Q. C., and Mr. *McClive*, for the plaintiff.

Mr. *St. John*, for the defendants other than the infants.

Mr. *James Miller* and Mr. *Cassels*, for the infant defendants.

The cases cited a · : mentioned in the judgment.

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SPRAGGE, C.—There is no doubt as to the facts of the case. [His lordship then stated the facts as above set forth, and continued.] The question is, which of these two innocent parties is to suffer?

The rule is well settled that payments made by a mortgagor to a mortgagee in ignorance of an assignment are good payments upon the mortgage against the assignee. Mr. *Coote* says, "The concurrence of the mortgagor in the assignment of a mortgage consequently should, if possible, never be dispensed with; and in cases in which, from unavoidable circumstances, an assignment is taken from the mortgagee only, the precaution should be had of obtaining a covenant from the mortgagee, that the money alleged to be owing is actually due; and notice of the assignment should be given to the mortgagor with the least practicable delay." If *Brown* had continued to pay *Currie* the interest and eventually the principal of the mortgage in ignorance of the assignment, there can be no doubt that the mortgage debt would have been effectually discharged:

Judgment.

As between *Wadsworth* and *Currie* there could of course be no room for doubt, the question is, whether the assignee of *Currie* stands in a better position as against *Wadsworth* than *Currie* himself.

It is contended that he does; that *Wadsworth* must be taken to have had notice of the assignment to *Junkin* by its being known to *Currie*, who, from his drawing the instruments by which the arrangement between *Brown* and *Wadsworth* was carried out, was the solicitor of both parties. The point was argued at the hearing, and I held that the case of *Kennedy* v. *Green* (*a*), applied; and I still think so, after examining more closely than

(*a*) 3 M. & K. 699.

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I could do at the time the cases of *Hewitt* v. *Loosemore*, (*a*), *Rolland* v. *Hart* (*b*), and *Atterbury* v. *Wallis* (*c*). I think it a proper conclusion, an almost irresistible inference, that there was at the time, on the 7th of December, 1863, on the part of Mr. *Currie*, an intent to keep alive both mortgages, that he conceived that idea, upon the proposed arrangement between *Brown* and *Wadsworth* being made known to him; the concealment of the assignment to *Junkin*, which it was his plain duty to disclose, is cogent evidence of this. I can conceive no motive for this *suppressio veri* except an intent to carry out the scheme concocted in his own mind at the time and acted upon in all his subsequent dealings with these mortgages. To disclose the assignment would have been to defeat this scheme; hence the concealment and hence the application of *Kennedy* v. *Green*. To assume that *Currie* did his duty as a solicitor of *Wadsworth*, and disclosed to him the assignment to *Junkin*, would be to negative *Kennedy* v. *Green*. *

Judgment.

I cannot at all accede to the argument that the non-disclosure of the assignment may have been innocent at the time, and that what fraud there was consisted in the not discharging the mortgage made by *Brown*. It was not in his hands to discharge, and he, of course knew it. His first impulse, apart from fraudulent intent, would have been to say, the mortgage is in other hands; but he concealed the fact, and his dealing with the mortgage afterwards shews plainly why he concealed it.

Another argument for the plaintiff is, that the assignment is registered, and that under the statute registration is notice. But registration is not set up in the bill. The plaintiff asked leave to amend. I refused this because I thought it would not be in furtherance of justice. *Wadsworth*, it must be conceded, was not as

(*a*) 9 Hare 449. (*b*) L. R. 6Ch. 768. (*c*) 8. D. M. & G. 454.

* See also on this point *Driffill* v. *Goodwin*, ante p. 431.

vigilant as he should have been. He should have searched the registry, and he should have seen that the mortgage on the land he was acquiring was discharged. He was negligent in both these respects. He trusted to *Currie*, unfortunately. But, on the other hand, *Junkin*, too, was negligent. He also trusted to *Currie*, and that so entirely that, as the witness *Junkin* says, he relied upon his covenant that the money should be paid, and neglected all the precautions (the covenant excepted) ordinarily taken by the assignee of a mortgage; and his negligence has occasioned the present trouble and loss. He does not stand in a position to ask the aid of the Court to enable him to establish his case against one less culpable in the way of negligence than himself.

A difficulty has occurred to me in the case, which is this: Has *Brown* paid off this mortgage? The mortgage assigned to *Junkin* was on lot *A.*; the payments that he has made have been upon the mortgage given by him to *Currie* upon lot *B.* Is *Wadsworth* in a position to say that the mortgage on lot *A.* is paid off? I think he is; because the *mortgage debt* is paid. The debt is the principal, the mortgage security is the accessory. It is true that the mortgage money has not been paid into the right hand, *i. e.*, to the holder of the mortgage, but if it was paid, as it was, through the negligence of the holder of the mortgage, the payment is good as against him. It is one remove from the ordinary case of continued payments to a mortgagee in ignorance of assignment. Such payments are good because the mortgagor has a right to assume, until he has notice to the contrary, that the mortgagee is still the holder of the mortgage, and so may deal with him upon that footing: *pari ratione*, he may, in the absence of notice, change the security, the mortgage debt continuing the same, and, continuing to pay, discharge the mortgage debt: the further consequence resulting from the application of the same principle, that the assignee has, by his

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negligence, enabled the mortgagee to deal with the mortgage debt as still due to himself.

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In my opinion the plaintiff's bill should be dismissed, and there is no sufficient reason why the costs should not follow the result. The suit is between the representatives of the original parties, but as nothing turns upon it, I have treated the case as between the original parties themselves.

In considering the case I have necessarily dealt with the conduct of the solicitor Mr. *Currie* as it appeared upon the evidence. He is not a party to the suit, and it is only right that I should give him an opportunity of accounting for and explaining the transactions which have given occasion to this suit. It is due to him to give him such opportunity; and it is due to the administration of justice to call upon him for explanation. I will take the same course as I took in *In re Hill*, (not reported), and an order will issue accordingly.

Judgment

Ross v. Simpson.

Sale of equity of redemption in chattels—Lease for years—Warehousing Co.—Sale of stock.

The Statute 20 Vic. ch. 3 sec. 11 (C. S. U. C. ch. 45 sec. 3), authorizes the sale by the sheriff of any goods and chattels under mortgage, the effect of such sale being to convey whatever interest the mortgagor had therein.

Held, (1) that this authorized the sale under execution of a lessee's interest in land although subject to two mortgages which were held by different parties, and although the lessee had previously parted with a portion of the property so leased; and (2) that this also authorized the sheriff to sell the interest of a debtor in stock in a warehousing company, although the same stood in the names of other persons, as to one part to secure a sum of money, and as to other part to secure the due performance of an agreement.

This bill was filed by the plaintiff as a judgment creditor of *J. H. Simpson & Co.*, to set aside a sheriff's

sale of the goods and chattels of that firm had under an execution issued at the suit of one *James Simpson*, father of *James Henry Simpson* and *Albert Simpson*, members of the said firm, on the ground that the judgment was recovered and execution enforced by collusion between the parties, and on the ground that the interests of the said debtors in a leasehold property held and incumbered, as set out in the judgment herein, and in shares of a Warehousing Company—which shares were held, according to the books of the Company, in the names of other parties—were not saleable under a *fi. fa.* goods. The case was heard during the Spring Sittings at Belleville, (1876.)

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Mr. *Hodgins*, Q. C., and Mr. *G. Henderson*, Q. C., for plaintiff.

Mr. *Fitzgerald*, Q. C., and Mr. *Holden*, for defendants.

McDonald v. *Reynolds* (*a*), *Osborne* v. *Kerr* (*b*), *Walton* v. *Bernard* (*c*), Doe d. *Webster* v. *Fitzgerald* (*d*), Doe d. *Court* v. *Tupper* (*e*), *Harrison's* C. L. P. Acts, 363, Con. Stats. U. C. ch. 22 secs. 255–260, were referred to by counsel.

PROUDFOOT, V. C.—At the hearing at Belleville I reserved judgment on three questions of law, viz.: Whether the sale of the leasehold by the sheriff was good, the debtor having only an equity of redemption, and having sold a part of the property leased; or, if saleable, whether the fact of there being two mortgages outstanding in different hands prevented it; and, whether the sale of certain stock in a warehousing company was good, it not standing in the name of the execution debtor; 50 shares having been assigned as a

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(*a*) 14 Gr. 691.
(*b*) 17 U. C. R. 134.
(*c*) 2 Gr. 344.
(*d*) M S. & E. T. 2 Vic.
(*e*) 5 O. S. 640.

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security that the debtor would supply motive power to machinery on a part of the leasehold he had sold, and 17 shares held by another person as security for $800.

A leasehold for years is saleable under a *fi. fa.* against goods and chattels: *Osborne* v. *Kerr* (*a*), *Sparrow* v. *Champagne* (*b*); it cannot be sold on an execution against lands: Doe d. *Court* v. *Tupper* (*c*).

It was formerly held that an equity of redemption of a term could not be sold on legal process, and that the only remedy was in equity: Doe *d. Webster* v. *Fitzgerald* (*d*), *Scott* v. *Scholey* (*e*), but that was at a time when no equitable interest was saleable on common law process. Since then an equity of redemption of an estate in fee has been made liable to common law execution *(f)*. The 20 Vic. ch. 3, sec. 11 (C. S. U. C. ch. 45, sec. 13), enacts that on any writ, &c., against goods and chattels, the sheriff, &c., may seize and sell the interest or equity of redemption in any goods and chattels of the party against whom the writ issued, and such sale shall be held to convey whatever interest the mortgagor had in such goods and chattels at the time of the seizure.

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Now the term itself is saleable as goods and chattels, and it would be rather odd if the equity of redemption of a term is not an equity of redemption of goods and chattels, and it would require rather a rigid construction of the statute to exclude them.

The word "chattels" has a meaning quite extensive enough, as we have seen, to include a term. The remark of the Chancellor in *McDonald* v. *Reynolds* (*g*), was only the expression of a doubt.

(*a*) 17 U. C. R. 134.
(*b*) 5 U. C. C. P. 394.
(*c*) 5 O. S. 640.
(*d*) E. T. 2 Vic.
(*e*) 8 East 467.
(*f*) C. L. P. A. sec. 257.
(*g*) 14 Gr. 691.

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Then are there any provisions in the Act which render it necessary to exclude terms of years from its operation? There are, indeed, provisions in the earlier clauses which seem to point more particularly at personal chattels, such as registration of the mortgage in the office of the Clerk of the County Court, and the removal of goods and chattels from the county; while, by the registry laws, conveyances of land and leases for more than seven years must be registered in the County Registry. But the 13th section is a general enactment containing no reference to the previous clauses, nothing to limit it to an equity of redemption in *such* goods and chattels as previously spoken of, and I see no reason why the words may not receive the full and enlarged signification, which is their natural meaning (*a*), in this 13th section, though in other clauses they may have a more restricted one. The object of the Legislature, I think, was to advance in the path of preceding legislation, and to make all a debtor's equitable property in mortgaged chattels available to satisfy his debts, as had already been done with his equitable interest in land mortgaged in fee.

Judgment.

Words and phrases in an Act of Parliament are assumed to be used in their technical meaning, if they have acquired one, unless it appears upon an examination of the rest of the law that they were used in a different sense: *Maxwell* on Stat. 2.

Though it is reasonable to presume that the same meaning is intended for the same expression in every part of the Act, yet this presumption yields readily to other considerations, and is but an uncertain guide: *Maxwell* on Stat. 282, 283.

I apprehend, therefore, that the phrase *goods and chattels* is to receive its technical meaning, and includes

(*a*) 2 Bl. Com. 385.

1876. chattels real, unless there be something in the Act to qualify it. The first twelve sections do seem to contain provisions more particularly applicable to personal chattels; the 13th section does not, and it is in agreement with the general course of legislation regarding equities of redemption, and should therefore receive a liberal and enlarged, which is strictly its technical, construction.

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I conclude that an equity of redemption of a term is saleable under common law process.

In this case the property leased to the *Simpsons* was a water lot for a term of 99 years, part of which they had sold, and assigned the term in that part to a warehousing company, and the sale by the sheriff was of the remainder; and it is said that the sheriff cannot sell a part of the premises demised, but can only sell the debtor's interest in the lease. Sir *John B. Robinson*, in dealing with this argument in *Osborne* v. *Kerr (a)*, says: "We believe that to be so, but with this qualification, that the sheriff may sell whatever the termor continues to hold under the lease, though it be only a part of the estate originally demised; but he cannot, it seems, sell a part of the interest which the termor holds under the lease, nor his interest in a part only of the premises which he holds under it." The qualification applies to this case, and the sheriff could sell the term in the part of the lands remaining in the lessee's hands.

Judgment.

It was further argued that, as there were two mortgages outstanding, one on the whole land leased, made before the sale to the warehousing company, and the other after that sale on the remainder of the land, the equity of redemption could not be sold. The reason why, under such circumstances, the sheriff cannot sell an

(a) 17 U. C. R. 134.

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equity of redemption in a fee simple estate arises from the construction placed on sections 258 and 259 of the C. L. P. A., declaring the effect of such a sale: *Heward* v. *Wolfenden* (*a*), *Wood* v. *Wood* (*b*), *Donovan* v. *Bacon* (*c*), *VanNorman* v. *McCarthy* (*d*); and *Van-Koughnet*, C., said that section 258 would be wide enough to cover such a sale, but its effect was limited by section 259.

I apprehend that if neither section 258 nor 259 had been in the statute, the sheriff, under section 257, might have sold such an interest. And that is how the matter stands in regard to the sale of an equity of redemption in chattels. Section 13 of C. S. U. C. ch. 45, is equivalent to section 257, and there is no such provision in ch. 45, as the sections 258 and 259, declaring the effect of the sale. Whatever interest, therefore, the debtor had in the seized goods and chattels passed to the purchaser.

Judgment.

In *Parkinson* v. *Higgins* (*e*), some remarks are to be found on the effect of a purchase by the mortgagor of an equity of redemption in chattels. *Hagarty*, C. J., considered it to be clear that he could not sue for the money due on the mortgage. But I have not at present to determine how the rights of the parties are to be worked out, but simply if the mortgagor's interest is saleable.

The C. L. P. A. sec. 255, authorizes the sheriff to take and sell in execution the stock held by any person in any company in Upper Canada in the same manner as other personal property of a debtor. But it is said that section 256, providing that upon a certificate of the sale, the proper officer of the company, the stock of which has been sold, shall transfer the stock from the name of the

(*a*) 14 Gr. 188.
(*b*) 16 Gr. 471.
(*c*) 16 Gr. 472.
(*d*) 20 U. C. C. P. 42.
(*e*) 37 U. C. R. 308.

1876. Ross v. Simpson. original stockholder to the person named in the certificate, shews that a sale can only be had when the stock stands in the name of the execution debtor, as it is to be transferred from his name to the purchaser. A not more technical construction might shew that a sale can only be had when the debtor is an original stockholder. I do not think either of these a correct construction of the Act. By ch. 45, sec. 13, the sheriff may sell the *interest or equity of redemption* in any goods and chattels. The 255th section, *supra*, says that stock and shares shall be saleable like other personal property. And if equitable interests in personal property are saleable, so are they in stock and shares. The word *goods* is wide enough to cover stock and shares when these have been made liable to execution: *Maxwell* on Stat. 56.

Judgment. Seventeen shares are pledged to secure a loan, 50 are in trustees' hands as a security for the supply of motive power to the warehousing company; in all, the debtor had an equitable interest, and I think it has been effectually sold. As the persons in whose names the stock stands are not parties to the action at law, it may be the purchaser may have to produce something more to the officer than the certificate of sale by the sheriff to entitle him to a transfer, *e. g.* the mortgage and instrument by which the interest of the debtor may appear, but this does not seem to me to be a valid objection to the sale.

The bill is dismissed with costs.

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Scanlon v. London and Port Stanley Railway Co.

Lottery—Tirage—Illegal disposition of lands—Railway company—Compensation for lands taken for railway.

A Railway Company took possession of certain lots in the city of London, Ont., under the compulsory powers in their Act of incorporation, but omitted to take any steps to ascertain the amount of compensation to be paid therefor. After a delay of some years the owner of the property filed a bill to enforce payment of compensation, when the company objected to the title on the ground that prior to the company taking possession the plaintiff had disposed of the property by lottery, and the company therefore felt unsafe in settling with him, and were not aware who were the parties really entitled to compensation. It appeared in evidence that nothing had been done to validate the title of the purchasers at such lottery as directed by the Statute, (27 and 28 Vic., ch. 32). The Court therefore decreed a reference to inquire as to the title of the plaintiff, when, if it should appear that the plaintiff could make a good title, the Master was to settle the amount of compensation, (being the present value of the land) which was to be paid by the company to the plaintiff, together with his costs of suit.

Statement.

The case made by the plaintiff was, that he was entitled as owner in fee simple to three parcels of land in London, Ontario—lot 2, on Nelson street, and lots 2 and 3 on opposite sides of Philip street; that the defendants took posses sion of these lots for the purposes of their railway; that they had made no agreement for compensation; had not made or tendered compensation; had taken no steps in order to arbitration; and had refused compensation.

The answer of the defendants admitted that they took and held possession of the lands in question. They denied that the plaintiff had a title in fee to the lands taken by them; alleged that they had been always ready and willing to pay for the same, but that the plaintiff, after possession taken by the defendants, sold his interest therein; that they were unable to ascertain who were the owners; that others besides the plaintiff had made claims, and they apprehended that he might have made conveyances to others.

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The answer did not deny that no compensation or offer of compensation had been made by the defendants, or any steps taken towards arbitration, but put the omission to do these things upon this, that the plaintiff, not having title, was not the person to receive compensation.

The other facts are stated in the judgment.

The case came on to be heard at the sittings at London in the spring of 1875.

Mr. *Maclennan*, Q. C., for the plaintiff.

Mr. *Meredith* for the defendants.

In addition to the cases mentioned in the judgment, counsel referred to *Cronyn* v. *Griffith* (*a*), *Corby* v. *McDaniel* (*b*), *Power* v. *Canniff* (*c*), *Mitchell* v. *Great Western Railway Co.* (*d*) and cases there cited, *Re Arnold* (*e*), *Welland* v. *The Buffalo and Lake Huron Railway Co.* (*f*), *Paterson* v. *The Buffalo and Lake Huron Railway Co.* (*g*). *Malloch* v. *The Grand Trunk Railway Co.* (*h*), *Re Mulholland* (*i*), *Re Mono* (*j*), *Walker* v. *Ware*, &c., *Railway* (*k*), *Wing* v. *Tottenham and Hampstead Junction Railway Co.* (*l*), *Inge* v. *The Birmingham, Wolverhampton, &c., Railway Co.* (*m*).

Judgment.

SPRAGGE, C.—It appears to me that the mode of settling compensation for lands taken by the defendants for their railway is that pointed out in the Great Western Railway

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(*a*) 18 U. C. R. 396.
(*b*) 16 U. C. R. 403.
(*c*) 18 U. C. R. 403.
(*d*) 35 U. C. R. 148.
(*e*) 8 L. T. N. S. 623; S. C. 11 W. R. 793.
(*f*) 30 U. C. R. 147; S. C. in App. 31 Ib. 539.
(*g*) 17 Gr. 521
(*h*) 6 Gr. 348.
(*i*) 18 Gr. 528.
(*j*) 6 Prac. Rep. 150.
(*k*) L. R. 1 Eq. 195.
(*l*) L. R. 3 Chy. 740.
(*m*) 1 S. & G. 347.

Act (*a*). This is apparent from section 9 of the Act passed in the same session incorporating the defendants' Company (*b*). The reason for this is to be found in section 13 of the same Act, which empowers the two companies to amalgamate. The General Railway Act (*c*) only applies to special Acts of incorporation where the special Act refers for that purpose to the General Act. See section 2 of the General Act (*d*). The Act incorporating the defendants' Company does not refer to the General Act.

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Upon the merits. The plaintiff does not shew title in himself otherwise than by his own *vivâ voce* evidence. He says that he acquired land, of which that taken by the railway is a part, from a Mr. *Parke* in 1854: whether the same Mr. *Parke* who is the delendants' solicitor does not appear. It is the plaintiff's dealing with the land that has raised the question in this suit. This is apparent from what the defendants' secretary, Mr. *Bowman*, says in his evidence: "We knew he had owned the lots and had parted with them by tirage." After he had purchased the land, he laid it out in lots, and sold a number of them, *inter alia*, those in question in this suit, by lottery "tirage." This was an unlawful sale, being against the provisions of 12 Geo. II., which has been held to be in force here, the first express decision to that effect being, however, subsequent to the lottery at which these lots were sold: *Cronyn* v. *Widder* (*e*), and the plaintiff states that he was cognizant that such a sale was unlawful.

Judgment.

The bill states—I think by mistake of the pleader—that the tirage was after the defendants took possession. The evidence of the plaintiff and of Mr. *Bowman*, secre-

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(*a*) 16 Vic. ch. 99.
(*b*) 16 Vic. ch. 133.
(*c*) 14-15 Vic. ch. 51.
(*d*) Sec. 3 in Con. Stat. Can. ch. 66.
(*e*) 16 U. C. R. 356.

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tary of the defendants, leads me to think that it was before.

One of the lots, No. 2 on Nelson street, stands on a somewhat different footing from those on Philip street. It was drawn at the tirage by one *Thomas*, who, it is said, gave a mortgage for purchase money. The plaintiff swears that he did; and says that he took the lot back; that he got a release from *Thomas*, but no deed, and has the mortgage only; and that, he says, is the only transaction he had with *Thomas* in regard to that lot. I assume he means to say that he has not been paid for it; it is not suggested that he has. *Bowman* says that he offered this as his title; that he did so at various times; that the defendants refused to take it, but offered to pay him for the lot if he would get a title.

A letter is put in from the plaintiff's solicitors to the defendants' solicitor, dated 3rd October, 1874, as follows: "In reply to your query we beg to say that *William Thomas* was the mortgagor of lot No. 2 on the south side of Nelson street, but *Scanlon* claims the fee by virtue of Stat. of Canada, 27 & 28 Vic. ch. 32."

Judgment.

I think the defendants were in error in refusing to accept as sufficient the title to the Nelson street lot offered by the plaintiff, upon the ground taken by them, and requiring him, as Mr. *Bowman* says, to "get a title." It is not suggested what he could have done. He could not compel a release from *Thomas*. If they had required him to verify the facts necessary to give him a title under the Act of 1864, I should understand their objection; but they do nothing but hold and use the land without compensation, and without shewing how or why they require a better title than the one that they know that the plaintiff has.

As to the other lots, they also are referred to in the

letter from which I have quoted. The writer says the plaintiff claims to be the owner of them in fee, "he having never made any conveyance of the same." At the date of this letter the plaintiff held a release—containing the words grant, release, and quit claim—of these lots from the person into whose hands they had passed. This is not referred to in the letter; it is not explained why. It is in evidence that no conveyance was ever made of these lots after the sale by tirage.

Previously to this, Mr. *Martin*, one of the plaintiff's solicitors, saw the defendants' solicitor, and thus states what passed: "Last summer, in July, I was instructed by plaintiff to take proceedings to recover compensation for these lots. I applied to the defendants' solicitor, Mr. *Parke*. I understood the difficulty was the plaintiff's title, and I took the Statute of 1864 with me and pointed it out to him. He said he knew plaintiff's title and disputed his right; he then intimated that he would advertise for owners to put in their claims, and he subsequently applied to me for the numbers of the lots."

Judgment.

The Act referred to, ch. 32, was passed "to quiet titles to certain properties sold by lot," and saves deeds and mortgages made upon such sales from the operation of 12 Geo. II. in the following cases:—

"1. In case the purchase money of such real property shall have been paid in full before the passing of this Act. 2. In case where a purchaser of such real property, having executed a mortgage or suffered a lien for the purchase money to remain thereupon, shall, within one year from the passing of this Act, pay an instalment of one-fifth of the amount remaining due thereupon."

Section 3 provides for the payment of future instalments where the purchaser, by the payment of one instalment, elects to retain his purchase.

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Section 4 is as follows: "In all cases where a purchaser of real property, disposed of as aforesaid, shall not, within a year from the passing of this Act, have made his election, in the manner prescribed by this Act, to retain such real property, any purchase money which he may have paid thereupon shall be forfeited; and neither the deed thereof to the purchaser, nor the mortgage thereof from him, shall come in any way within the provisions of this Act, nor shall the land be forfeited under any of the provisions of the above cited Imperial statute, but the title shall remain unaffected by any of such provisions."

The forfeiture of the land under the Imperial statute, referred to in the 4th section, is the forfeiture of the land or other thing sold by lottery, to the person suing for the same under section 4 of 12 Geo. II. The effect, therefore, of section 4 of the Canadian Act is, in my opinion, to avoid conveyances and mortgages not saved under the provisions of section 1; the purchaser forfeiting his rights as purchaser unless he saves them under section 1; and, there being no forfeiture to the Crown or to any one suing as in the Imperial Act, the vendor is in as of his old title. It is not suggested as to the Nelson street lot or the other lots, that they were saved by the purchaser under section 1.

Judgment.

The chief complaint by the defendants as to the Philip street lots appears to be that the claim as to them has been made suddenly and of late date, and without giving them time to ascertain its correctness. Mr. *Bowman* in his evidence says that no claim for them was ever made to him until after this suit. But this is not quite correct, for he says: "We (the company) had a communication from Mr. *Parke* as to the claim for all the lots, and I wrote to plaintiff, saying we would pay him if he would make a good title." That was on 1st November, 1873. Then there was the interview between the

solicitors in July, 1874, and the letter which I have already quoted. Further, it was *eight* lots in all of plaintiff's of which the defendants had taken possession, and there was an arbitration as to compensation in regard to five ; the three now in question were excepted—placed in the same category. It is idle for the company or their secretary, after all this, to set up that there was undue haste in filing the bill. The bill was filed 24th October, 1874.

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They have raised questions as to the title of the plaintiff, yet have not proceeded under the provisions of the Act where the title is doubtful, but have simply taken the land and held it. In my opinion, the plaintiff has a remedy in this Court. Whether in England the remedy is by bill, as was held by Sir *James Wigram* in *Walker* v. *Eastern Counties Railway Co.* (*a*), and by Lord *Romilly* in *Regents' Canal Co.* v. *Ware* (*b*), or by *Mandamus* as was held by Lord *Hatherley* in *Lind* v. *Isle of Wight Ferry Co.* (*c*), is immaterial, inasmuch, as under our Administration of Justice Act of 1873 section 32, the remedy may be in this Court or at common law.

Judgment.

The defendants can have a reference as to title if they desire it, in order that the facts upon which the plaintiff's title depends may be verified.

The amount to be allowed for compensation, in the event of its being shewn that a good title can be made, may be settled by the Master. I understand that the defendants prefer that mode of ascertaining the amount proper to be paid, to a reference to arbitration under the statute. It would appear from the case of *Stretton* v. *Great Western & Brentford Railway Co.* (*d*), that the

(*a*) 6 Hare 594.
(*b*) 23 Beav. 575.
(*c*) 7 L. T. N. S. 416.
(*d*) L. R. 5 Chy. 751.

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In the event of the plaintiff shewing a good title, he should have his costs.

Garrett v. Saunders.

Mortgage—Pleading—Demurrer—Executor.

A bill to enforce payment of a mortgage after the death of the mortgagee, where his estate remains interested therein, must be filed by the executor or other personal representative; his widow (as such) has no right to file such a bill.

Where a bill stated that "*H.*, the widow of the said *C.* (the mortgagee), and the person entitled by law to receive the moneys secured by said mortgage, exhibited her bill of complaint:"

Held, bad on demurrer, as not shewing with sufficient distinctness how she was entitled.

Demurrer for want of equity. The grounds of demurrer appear in the head-note and judgment.

Mr. *Attorney General Mowat*, for the demurrer.

Mr. *Moss*, contra.

Judgment. Blake, V. C.—So far as the pleading is concerned the case of the plaintiff depends on *Hannah Taylor Williams* being the personal representative of the estate of her husband *Charles Wheddon Williams*. The bill alleges that he made his will and that probate of it was granted to his executors. This in no way connects the widow with the probate of the will. The allegation on which the learned counsel for the plaintiff sought to support the bill is the following in paragraph 7: "*Hannah Taylor Williams*, the widow of the said *Charles Wheddon Williams*, and the person entitled

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by law to receive the moneys secured by said mortgage, exhibited her bill of complaint." Mrs. *Williams* may have been the person entitled by law to receive the mortgage moneys, as she may have been the person to whom the mortgage was bequeathed. The executors may have refused to give her the mortgage or the proceeds, and she may have taken proceedings in respect of it, which may or may not have been abortive. I cannot speculate as to whether the steps which she is stated to have taken in the Court were according to its practice or not, or likely to succeed. All it is necessary for me to find is that Mrs. *Williams* may have been the person entitled by law to receive the mortgage without her being executrix of her husband's will, and this being so that there is no statement that she was executrix, or that she is the person represented by the bill as the executors who proved the will, and that as this is a material allegation in the plaintiff's case I must make the usual order allowing the plaintiff to amend on payment of costs.

Judgment.

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The Victoria Mutual Fire Insurance Company v. Bethune.

County Courts—Interpleader—Administration of Justice Act.

The Administration of Justice Act (1873, O.) applies to proceedings in County Courts as well as to those in the Superior Courts of the Province. Where, therefore, the Judge of the County Court of Wentworth had in garnishee proceedings made several orders for payment out of moneys admitted to be in the hands of an insurance company, and subsequently the Judge of the County Court of Essex, in opposition to the contention of the company, made a similar order at the instance of another creditor, which had the effect of rendering the company liable to pay a sum greatly exceeding the amount found due to the original debtor, and the company filed a bill calling upon the several claimants to interplead, the Court refused to make such an order, on the ground that the rights of all parties might have been adjusted in the suit in the County of Essex, and if dissatisfied with the decision there the company might have appealed from it.

Statement.

The bill in this case was filed by *The Victoria Mutual Fire Insurance Company of Canada* against *Donald Bethune, Thomas C. Sutton, Charles Scadding, Dennis Brassard, Edward D. Neveux & Joseph Neveux, John Hutton, Thomas L. Fox & William McKee, Charles P. Baby, S. P. C. Clark* and *David H. Abel*, setting forth (1) that the plaintiffs had issued a policy insuring the stock of goods and fixtures of the defendant *Clark* against loss by fire in the sum of $300, for three years from the 26th day of September, 1874, and a similar policy insuring his stock of goods against loss by fire, in the sum of $400, for three years from the 20th day of January, 1875; (2.) that a fire took place in the premises on the 31st of July, 1875, and *Clark* thereafter furnished to the plaintiffs proofs of his alleged loss by such fire; (3.) that thereafter the plaintiffs proposed to pay to *Clark* a sum of money in satisfaction of his claim for such loss, but he declined to accept the same, and thereupon the question of the value of the property damaged or destroyed by such fire was submitted to

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three persons as referees, under the provisions of the 53rd section of the statute relating to Mutual Fire Insurance Companies ; (4.) that such referees, on the 22nd day of February, 1876, made their award and assessed the value of the property so destroyed, and the damage payable by the plaintiffs in respect thereof at $623, which amount they had not yet paid, but were ready and willing to pay such amount to the parties entitled thereto, less $40.42 remaining due to plaintiffs on account of premiums. The bill further stated (7.) that a garnishee summons issued out of the First Division Court of the County of Wentworth, at the suit of the defendant *Bethune*, as primary creditor, against *Clark*, as primary debtor and the plaintiffs as garnishees, was served on the plaintiffs on the 17th of December, 1875, and such summons was on the 26th of January, 1876, adjourned to the then next sittings of that Court ; (8.) that the solicitor of the plaintiffs attended before the Deputy Judge of the said County Court on the said summons on the 28th of February, 1876, and admitted that an award had been made in favor of *Clark* on the said policies of insurance against the plaintiffs, but stated that the plaintiffs were dissatisfied with the amount. The Deputy Judge thereupon made an order in the terms and figures following : " On hearing it is adjudged, (1st). That the primary debtor is indebted to the primary creditor in $75.56 and taxed costs payable in fourteen days. (2nd.) That the garnishee is indebted to the primary debtor in $ which to the extent of the first two mentioned sums ought to be applied in part satisfaction thereof. (3rd.) That the primary creditor do recover against the garnishees the said sum of $75.56 at the expiration of the first four days of next Easter term in satisfaction as aforesaid. W. Lynn Smart, Deputy Judge." (9). That the plaintiffs were served with seven other like attaching summonses in respect of the amount which might be payable by them to *Clark*, all issued from the said First Division Court of Wentworth,

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at the suit of the defendants *Sutton*, *Scadding*, *Brassard*, *Neveux*, *Hutton*, *Fox & McKee* and *Baby*, against the defendant *Clark*, as primary debtor, and the plaintiffs as garnishees, and on the 28th day of February, 1876, similar orders to that above set out were made for sums amounting in all to $507.41; (10), that on the 11th day of May, 1876, the secretary of the plaintiffs was served with an order made by the Judge of the County Court of the County of Essex on the 5th day of the said month of May, in a certain cause or matter depending in that Court, wherein the defendant *Abel* was judgment creditor, the defendant *Clark* and one *Catharine Saunders* were judgment debtors, and the plaintiffs were garnishees, which order directed the plaintiffs to pay to the said *Abel* the sum of $208 and the costs of such proceedings, which had since been allowed by the proper officer at the sum of $38.11, and in default of such payment, execution to issue for the same; (11), that notwithstanding the plaintiffs opposed such last mentioned order, the Judge made the same with a full knowledge of the facts hereinbefore set out of the previous orders, holding that at the time of the service of the former garnishee summonses there was no debt due or owing by the plaintiffs to *Clark* which could at that time be attached or form the subject of garnishee proceedings; (12) that thereupon the plaintiff applied on the 17th May, 1876, to the Judge of the County Court of Wentworth in the garnishee matter, in which the defendant *Bethune* was primary creditor, and obtained a summons for the parties in that matter to shew cause why the order of the 28th of February should not, so far as it affected the plaintiffs, be rescinded under the circumstances hereinbefore set forth, and it was arranged by and between the plainffs and all the other parties interested that all the other said orders made on that day should abide the result of that application; (13), that upon hearing the parties the said Judge did, on the 28th day of July, 1876, discharge

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the said summons, holding that he had not authority to rescind the order of the 28th of February; (14), that upon such application the plaintiffs admitted that they were liable and were willing to pay in respect of the said policies of insurance the sum of $582.58, and that this was the only sum in which any of the defendants claimed to be interested, and the plaintiffs were not indebted to *Clark* in any sum of money whatsoever except such sum of $582.58 under said policies and award; but the said orders direct the plaintiffs to pay in respect thereof, in the aggregate the sum of $828.58; * * * (16), that the defendants other than *Clark* threatened and would, unless restrained, issue execution upon the said several orders or judgments, and compel the plaintiffs to pay the several amounts so directed to be paid by them.

Statement.

The prayer of the bill was, that the defendants, other than *Clark*, might be restrained from proceeding to enforce payment of the said amounts, or any of them, until it was determined to whom the same should be respectively paid, and that the said defendants might be ordered to interplead, &c.

The affidavits filed shewed that on the 29th July the defendant *Bethune* sued out execution and seized the plaintiffs' goods. The bill was filed on 30th July and an interim injunction was then granted.

Sept. 12th.

The plaintiffs now moved to continue that injunction to the hearing.

Mr. *Walker*, for the plaintiffs, in support of the application, referred to *Chamberlain* v. *Torrance* (*a*).

Mr. *Crickmore* and Mr. *Moss*, contra, contended that after having contested the matter at law the plaintiffs

(*a*) 14 Gr. 181.

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were too late now in applying to this Court for parties to interplead; besides the plaintiff, in such an application should stand indifferently between the parties, and if the plaintiff claims any beneficial interest in the fund he cannot call upon claimants to interplead. In *Mitchell* v. *Hayne* (*a*) the bill was filed for interpleader, and the plaintiff only claimed that he was entitled to his commission on the sum in contest, and yet the Court held that he was not entitled to call upon the parties to interplead, and here the plaintiffs desire that parties should interplead for a smaller sum than that awarded by the referees. *Mitchell* v. *Hayne* shews this cannot be done, and *Bignold* v. *Audland* (*b*) approves of that view.

This Court does not sit to correct other Judges, and *Fuller* v. *Patterson* (*c*), *Cornish* v. *Tanner* (*d*), *Crawshay* v. *Thornton* (*e*), shew very clearly that the Court will not grant an order to interplead after a verdict at law. Under the Administration of Justice Act the plaintiffs could have obtained in the County Court all the relief they now seek.

Sep. 23rd.

Judgment.

PROUDFOOT, V. C.—I am not much impressed with the objections to the plaintiffs' right to an injunction because they claim an interest—or have favoured one party more than the other—or on the ground of delay. In these respects the conduct of the plaintiffs does not seem to me objectionable.

But on the objection that the remedy of the plaintiffs was in the Court in which judgment was obtained, I apprehend that since the Administration of Justice Act, and the decisions upon it (*f*), I must refuse to continue this injunction. There was nothing to prevent the plaintiffs appealing from the decision in the County

(*a*) 2 S. S. 63.
(*b*) 11 Sim. 23.
(*c*) 16 Gr. 91.
(*d*) 1 Y. & J. 333.
(*e*) 2 M. & C. 1.
(*f*) *Henderson* v. *Watson*, ante p.355.

Court of Essex, and upon that it would have been determined whether the judgments in the Division Court of Wentworth were properly obtained. The Administration of Justice Act applies to County Courts, and in the proceedings in Essex all the claimants might have been summoned under that Act, (1873, sec. 8) and a judgment or decree made adjusting all the rights of the parties. If dissatisfied with the decision, it might have been appealed from.

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Judgment.

The motion is refused, with costs.*

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Patent of invention—Prior user or prior sale of patented article—Mechanical equivalents—Colourable deviations—Pleading—Practice.

Though the number of mechanical powers are limited, their combinations may be very numerous; and a new combination of previously known implements or elements is the proper subject of a patent.

To invalidate a patent of invention on the ground that the subject thereof was in public use in any of the Provinces of the Dominion for more than a year prior to the application of the inventor for a patent, such use need not be shewn to have been with the consent of the inventor; but, to invalidate a patent on the ground that the subject was on sale in any of such provinces for that time, it must be shewn to have been so on sale with the consent or allowance of the inventor; in this respect section 6 and sub-section 32 of the Act of 1872 (35 Vic. ch. 26) correspond in their provisions.

An inventor had in 1869 obtained a patent in the Province of New Brunswick—which in April, 1873, was extended over the whole Dominion under the Patent Act of 1872—but which proved inoperative by reason of an unintentional defect or insufficiency in the description and specification, and the inventor having surrendered that patent, obtained one from the Dominion Government in 1874, in accordance with an amended description and specification, for the unexpired term of the one so surrendered:

Held, that the prior user of the invention so patented in New Brunswick (and extended) was not such a user as invalidated the patent of 1874.

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* The plaintiffs have since filed a petition in Appeal, and case to be heard next December.

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The plaintiff obtained a patent for "a new and useful improvement in seed drills," which was particularly described in the specification attached to the patent. Subsequently the defendant procured a patent to be granted to him for "Sylvester's Improved Spring Hoe," which he made and attached to seeding machines. The plaintiff, claiming that the machines manufactured by the defendant were substantially the same as those plaintiff had obtained his patent for, sought to restrain their further manufacture by the defendant, and on the hearing the evidence shewed that the machines were substantially the same, with colourable deviations only—the chief one being the mode of attaching certain pivot connections or bars forming what are known as toggle or elbow joints, which the plaintiff attached below the junction of the draw bar with the tubes or hoes, while the defendant attached his above; the power thus operating by compression on the defendant's bars and by tension on those of the plaintiff, and in both by tension on a gutta percha spring. The Court, being satisfied that the difference was only one of mechanical arrangement or a mere substitution of mechanical equivalents, and not a difference in principle of the invention, granted the relief prayed and ordered the defendant to pay the costs of the litigation.

Where a defendant declines to admit, by stating he "does not know or admit the truth" of certain facts alleged in the bill, it is incumbent on the plaintiff to prove such allegations, as by declining to admit the defendant in effect denies them, and, if he desires to do so, may give evidence at the hearing in support of such denial; therefore, where the object of a bill was to restrain the infringement of a patent which the plaintiff alleged was for "a new and useful improvement," and the defendant in his answer having stated that he "did not know or admit" the truth thereof, at the hearing offered to give evidence of the want of novelty in the alleged invention of the plaintiff as a ground for invalidating his patent:

Held, that he was at liberty to do so

Statement.

The plaintiff *Patric*, in 1869, obtained a patent in the Province of New Brunswick for "improvements in grain and seed drills," and so far as the matters in question in this suit were concerned, the improvements claimed, consisted in "the novel combination and arrangement * * * of flexible conductor tubes, *f.* ground tubes, *g.* chains or analogous suspenders, *h.* roller, *i.* draw bars, *m.* locking stud, *n.* spiral spring, *o.* pivot connections, 1, 2, 3," and, as explained in the specification, the object attained was described as follows: "The union of the ground tubes to the draw bars is accomplished in a man-

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ner which will permit the lower end of the tube to give way when coming in contact with a fixed stone or other serious obstruction, without injury to the tube which immediately resumes its working position when the obstacle is surmounted and without stoppage of the machine or demanding any attention of the person in charge." The pivot connections formed what is called a toggle or elbow joint, similar in principle to that used for keeping in position, and lowering carriage covers.

On the 22nd of April, 1873, a patent of extension was granted by the Dominion authorities to *Patric*, extending the New Brunswick patent over the whole Dominion of Canada, under the Patent Act of 1872.

On the 19th of May, 1873, *Patric* represented to the Commissioners of patents that the original patent issued under the Patent Act of New Brunswick was inoperative by reason of defective or insufficient description and specification, and that the errors arose from inadvertence, accident, or mistake, without any fraudulent or deceptive intention, and that he was desirious of obtaining a new patent in accordance with an amended description, and to be allowed to surrender his original patent. He did surrender his original patent, and on the 21st September, 1874, a patent was granted to him for the unexpired term of the New Brunswick patent in accordance with his amended description and specification. The defect in the original description and specification did not touch the matters in question in this suit.

Statement.

The patent of September, 1874, was granted for "a new and useful improvement in grain and seed drills," which, so far as now in question, consisted "in a tube constructed as described, arranged to operate with a ground tube in various positions; in the spouts in combination with the flexible conductors and ground tubes; in the ground tubes, draw bars, bars, locking stud, pivots 1, 2, and 3, and spiral or other spring."

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In the amended specification the object attained was described as in the specification for the New Brunswick patent. After describing his invention *Patric* disclaimed "all other forms of grain and seed drills now in use," and stated what he claimed as his invention on the matter now in question. "3rd. The ground tubes *g*, draw bars *k*, bars *m*, locking studs *n*, pivots 1, 2, and 3, and spiral or other springs *o*, substantially as and for the purposes described."

On the 20th of July, 1874, *Patric* obtained a Dominion patent for "*Patric's* broad cast seeding machine," which embodied a similar plan for enabling the hoes forming part of the machine, on meeting an obstacle to pass over it, and then return automatically to their original working position.

Statement.

The bill alleged that the defendant had recently begun to manufacture and sell seeding and other machines made in accordance with the plaintiff's invention or with colourable deviations therefrom, or the substitution of mere mechanical equivalents for the same, and claimed to have invented and obtained letters patent for a new form of spring hoe for use with seeding machines which he called "Sylvester's Improved Spring Hoe," and which he made and attached to seeding machines, and that the only difference between the pretended invention of the defendant and that of the plaintiff was one of mere form without any material alteration of structure and without any substantial different combination of mechanism; and that the defendant obtained his patent by means of false representations that he was the original inventor—and stated the letters patent to defendant of 26th January, 1875—but charged that the alleged invention was identical in all essential respects with the plaintiff's invention, and that the letters patent did not cover any new or useful invention.

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The specification attached to the defendant's patent described his invention as follows: "My invention relates more particularly to improvements in the connection between the hoes and the draw bar, and it consists in pivoting the hoe to the draw-dar, so that one end projects above the draw bar and is connected by double links to one arm of a pivoted lever, the other arm of which is attached to a tension spring which holds and locks the hoes in position. The object of my invention is to rigidly hold the hoes to their ordinary work, and yet permit them, when the pressure from any cause becomes so great as to be liable to break them, to yield and swing out of the way, returning to their place immediately the obstruction is passed," and he claimed as his invention "The hoe, with upper arm, in combination with the drag bar, spring, pivoted lever and links, arranged and operating substantially as described and for the purposes specified."

Statement.

The bill prayed that the defendant's patent might be declared null and void and might be delivered up to be cancelled; and for an injunction to prevent the defendant from manufacturing, &c., machines according to his pretended invention, and from otherwise infringing the plaintiff's patent; and for an account of profits made by defendant.

The defendant by his answer stated that he "Did not know or admit the truth of the facts alleged in paragraphs 1 to 11 inclusive of the bill," denied infringing the plaintiff's patent; set up the patent to himself; stated that since the date of his patent he had manufactured machines containing his patented invention, but denied that his invention incorporated the plaintiff's invention, and that the difference between them was not one of mere form.

Among the paragraphs of the bill which the defendant declined to admit was the 11th, which alleged that the

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plaintiff's inventions at the time of their being patented were new, useful and unknown and unused in the Dominion of Canada, except as to the first which had been used under the original patent in New Brunswick.

Mr. *Bethune*, Q. C., Mr. *Moss*, and Mr. C. A. *Jones*, for the plaintiff.

Mr. *Attorney-General Mowat* and Mr. *Fitzgerald*, Q. C., for defendant.

The authorities cited are mentioned in the judgment.

At the examination the defendant claimed the right of giving evidence to prove that the plaintiff's inventions were not new, insisting that the rule of pleading at law and in equity differs in this respect—that at law, whatever is not traversed, or confessed and avoided, is admitted; while in equity the General Order 123, provides that the silence of the answer as to any statement of the bill is not to be construed into an implied admission of its truth. That order 122 providing that answers are to consist of a clear and concise statement of such defences as the defendant desires to make, relates only to defences arising outside the bill, in the nature of pleas in confession and avoidance at law. That the allegation of novelty was a material one and essential to the validity of the plaintiff's patent, and that the defendant expressly declining to admit the truth of it, in effect, traversed it.

Statement.

The plaintiff, on the other hand, contended that the patents were *primâ facie* proof of novelty, and that the defendant could not give evidence to contradict it, without relying on the defence by answer; that the plaintiff was taken by surprise, and that it would be inequitable and unjust to permit the evidence to be received. That the proper course for the defendant, if he wished to

raise such a defence was to apply for leave to file a supplemental answer. 1876. Patric v. Sylvester.

PROUDFOOT, V. C., [after stating the facts as above set forth, continued]—I received the evidence tendered by the defendant. It seemed to me that the allegation of novelty was material to the plaintiff's case, and, assuming the patents to be *primâ facie* evidence, the defendant must have the right to displace it; that so soon as it became a question of evidence, it ceased to be one of pleading; that by declining to admit, the defendant, in effect, denied the allegation and was at liberty to give evidence in support of such denial. June 28th.

The objection was repeated at the hearing; and I have again considered it. No authority was cited, and I have found none; but I continue of the opinion I have expressed. If I have rightly construed the order, it is capable of being used much to the prejudice of litigants, and may require to be modified or abrogated, but while it remains I must observe it. Judgment.

A number of witnesses were examined on the part of the plaintiff who proved his invention to be useful, and that in their opinion the defendant's machine was an infringement of it.

The result obtained by both was the same, viz., permitting the tube of the seed drill, or the hoe of the broad cast seeding machine, to surmount an obstacle and return automatically to its original position. It was accomplished by the same means, the toggle or elbow joint, the pivoted bars, the tension spring, and that the difference consisted only in the arrangement of the materials; the plaintiff attaching his bars below the junction of the draw bar with the tube or hoe, while the defendant attached his above. The power operated by compression on the defendant's bars, and by tension on the plaintiff's, and in both by tension on the

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gutta percha spring; and the defendant's machine was by a new arrangement of the parts converted in Court into one like the plaintiff's. The defendant's witnesses on the other hand said that there was an essential difference between the two machines; that in the plaintiff's the lever arrangement was a lever of the second kind, the force being applied between the weight and the fulcrum, while in the defendant's it was a lever of the first kind, where the fulcrum is between the power and the weight, and that the force operated by tension on the bars in the plaintiff's, and by compression in the defendant's; that the action was reversed.

On both sides it was agreed that the plaintiff's invention, the combination of previously known materials and powers to produce a different and useful machine, was a proper subject for a patent.

Judgment.

The conclusion I have come to after a careful consideration of the evidence is, that if the plaintiff's patent be a valid one, there has been an infringement of it by the defendant, and in this conclusion, one at least of the defendant's witnesses agrees. Others of them admit that the principle is the same in both, but think that the difference of construction sufficiently distinguishes them. Mr. *Aird* relies on the *rolling lock*, a part of the elbow joint in the plaintiff's machine, as differing essentially from the mode in which the joint is applied in the defendant's, but he admits they are both elbow joints. Mr. *Ridout*, his partner, is in doubt if the plaintiff's be an elbow joint. All the other witnesses speak of both being elbow joints; this joint, the lever power, and the tension power is the same in both, and the facility with which one machine was, in my presence, converted into the other satisfies me that the difference is only one of mechanical arrangement and not a difference in the principle of the invention.

The defendant contends, however, that the plaintiff's

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patent is void on the ground of prior user, in other provinces of the Dominion than New Brunswick, before the date of the patent of September, 1874; and a distinction was attempted to be made between the language of the Patent Act of 1872, section 6, relating to the grant of original patents, and of section 32, sub-section 2, as to the extension of Provincial patents; that to invalidate the former it must have been used with the consent of the inventor in Canada; while in the latter all that was required was *knowledge* of the invention, and that the *consent* of the inventor in section 32, referred only to the *sale* with his consent.

I think no such distinction exists. Section 6 says "Any person having invented any new * * machine, * * not known or used by others before his invention thereof, and not being in public use or on sale for more than one year previous to his application, in Canada, with the consent or allowance of the inventor * * may obtain a patent." Section 32 says "It shall be lawful for the Commissioner, upon the application of the patentee * * being the inventor * * if the subject matter of the patent has not been known or used, nor with the consent of the patentee on sale in any of the other Provinces of the Dominion to issue * * a patent for the remainder of the term." In neither case need the knowledge or use be with the consent of the inventor, and in both the consent is limited to the sale. The 6th section, indeed, says *not being in public use*, with consent, &c., but public use must be comprehended under the more general phrase *used by others* which does not require consent. I agree in the construction contended for of section 32, but do not think the Legislature intended to alter the law as to priority of user by the construction insisted on of section 6.

Judgment.

The evidence for the defendant shewed a user, a manufacture and sale by one manufacturer, of the

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plaintiff's invention, *except the peculiar automatic adjusting apparatus now in question*, after the patent of April, 1873, and before the patents of July and September, 1874. And the patent of 1873 having been inoperative from some defect in description, it is contended that the plaintiff's right only dates from July or September, 1874, and that the prior use invalidates it.

It is, perhaps, a sufficient answer to this to say that the whole machine embracing this peculiar combination was not in use during that period; and without it the manufacture was of nothing more than of ordinary seed drills which were disclaimed by the inventor in his specification.

But the 19th section of the Act of 1872 expressly enacts in the case of a patent being defective by reason of insufficient description or specification, from inadvertence, &c., and a new patent being issued on amended specifications; that "The new patent and amended description and specification, shall have the same effect in law, on the trial of any action thereafter commenced for any cause subsequently accruing, as if the same had been originally filed in such corrected form before the issue of the original patent."

Judgment.

The effect of this is to destroy the operation of user between the issue of the two patents as invalidating the latter. There can be no remedy for the intermediate user, as the patent was then inoperative; but for any subsequent infraction of the discovery, the user shall not operate as a defence.

Reference was also made to a number of patents in the United States, the publication of which in Canada appeared from copies of the *Scientific American*, and in the *Official Gazette* of the American Patent office. In these cases some had an elbow joint, some a pivoted

share, some a pivoted share and drag bar, one a pivoted prong of a horse hay rake, but in none of them of date prior to the plaintiff's patent is there found the combination which the plaintiff claims as his discovery. The only one embodying all the elements of the plaintiff's is subsequent in point of date.

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It was further contended that the plaintiff's specification was too extensive, as claiming not only his own discovery but the parts that were previously in use. It is true that all the mechanical powers and materials used by the plaintiff were well known before, but there is no evidence of any one preceding him in the peculiar combination of them. If he has, in fact, claimed these separate elements as his invention, as well as the combination of them, it may be that the patent is void; but on this I desire to express no opinion. However, upon the fair and reasonable construction of the specification I find no such claim. The plaintiff expressly disclaims all other forms of grain and seed drills then in use. What he claims must then be the difference between these and his invention, or in other words the peculiar combination in which the excellency of his discovery consists.

Judgment.

That a patent may issue for the combination of previously known implements or elements is established by many cases, and that it must be so is apparent from the limited number of mechanical powers, though the combinations of them may be very numerous.

I refer to the following cases as a few of those I have consulted: *Rex* v. *Wheeler* (*a*), *Crane* v. *Price* (*b*), *Hill* v. *Thompson* (*c*), *Jupe* v. *Pratt* (*d*), *Harwood* v. *The Great Northern R. W. Co.* (*e*), *Cannington* v. *Nuttall* (*f*),

(*a*) 2 B & A. 349.
(*b*) 4 M. & G. 580.
(*c*) 3 Mer. 622.
(*d*) 1 Webst. P. C. 144.
(*e*) 11 H. L. 654.
(*f*) L R. 5 H. L. 205.

1876. *Murray* v. *Clayton* (*a*), *Lister* v. *Leather Co.* (*b*), *Seed* v. *Higgins* (*c*), *Clark* v. *Adie* (*d*).

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Judgment.

I think, then, that the plaintiff has made out his case and is entitled to a decree for an injunction and an account, with costs.

Bunting v. Bell.

Mechanics' Lien Act—Appeal by assignee.

G. & *M.* agreed with the defendant *B.* to furnish and put up in his building certain machinery, to be paid for partly by assigning a mortgage for $1066 held by *B.* and the residue of the price to be secured by a mortgage to be executed by *B.*, no time being mentioned for which credit was to be given. On the 8th of June, 1875, *B.* discharged *G.* & *M.'s* workman from further work in putting up the machinery, and the balance thereof was left in the building. On the 2nd of July, 1875, *G.* & *M.* registered the usual mechanics' lien for $1030, balance of the price of the machinery so put up, and $38.45 for labour, and on the 7th of the same month filed a bill to enforce their lien, which on the 19th of January following, on motion of the defendant, was dismissed for want of service, but without prejudice to the lien (if any) of *G.* & *M.* On the 15th of July preceding the present suit was commenced, and on the 19th of January a decree was made declaring the plaintiffs entitled to a lien and directing the usual accounts to be taken.

Held, that as against *B.*, *G.* & *M.* were entitled to prove for the amount of their claim; and as the plaintiffs did not appeal from the allowance thereof by the Master the Court dismissed an appeal therefrom by the assignee of *B.* with costs.

In January, 1875, the defendant *Bell* agreed with *Goldie & McCulloch* to furnish the building of the defendant *Bell*, with such machinery as he should require at the prices mentioned in their price list, and to put up the machinery at the usual working rates, which were not mentioned in the price list,—*Bell* to assign to them in

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(*a*) L. R. 7 Chy. 570., L. R. 10 Chy. 675 *n.*
(*b*) 3 Jur. N. S. 812, 4 Jur. N. S. 947.
(*c*) 8 H. L. C. 550. (*d*) L. R. 10 Chy 667.

part payment a mortgage for $1,066 and to give a mortgage for the balance. No time of credit for the balance seems to have been agreed on. *Bell* assigned the mortgage on the day the contract was made. 1876. Bunting. v. Bell.

On the 7th April, 1875, the machinery was forwarded to *Bell* and lay on his premises till about the 25th May, when *Goldie & McCulloch*, at *Bell's* request. sent a man to put up the machinery. The man worked at it till 8th June, by which time he had set and placed the steam engine and boiler, of the value of $1,030, and his work and expenses, less a sum of $6 paid to him by *Bell* on the 8th June—amounted to $38.45, *Bell* discharged the machinists from putting up any of the rest of the machinery, intending to do it himself at his convenience, and it was merely run into the mill.

On the 2nd July, *Goldie & McCulloch* filed a mechanic's lien, as they termed it, in the Registry office for the County of Wellington, and on the 7th July filed a bill to realize their claim and enforce their lien. This bill was dismissed on the application of the defendant *Bell*, on 19th January, 1876, for want of service, but the dismissal was declared to be without prejudice to such lien (if any) as the plaintiffs might have acquired under the "Mechanic's Lien Acts of 1873 and 1874," by the filing of the said bill, and without prejudice to the plaintiffs' rights (if any) to proceed to enforce such lien (if any) under the provisions of the Insolvent Acts in force in this Province. Statement.

In the meantime, however, and on the 15th July, 1875, the present bill was filed, and on the 19th January, 1876, a decree was made declaring the plaintiffs to have a lien under the Lien Act of 1874, and directing an account to be taken by the Master at Guelph of the amount due to the plaintiffs and any other incumbrancers, except prior mortgagees, &c.

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Under this decree *Goldie & McCulloch* claimed a lien for the balance due to them for the machinery which the Master allowed.

Bell became insolvent on the 25th July, 1875, and the defendant *Patterson*, was appointed his assignee. *Patterson* appealed from the report, because the Master had allowed the claim of *Goldie & McCulloch*.

Mr. *Moss*, for appeal.

Mr. *W. Cassels* and Mr. *Ball*, contra.

Sept. 13th.

PROUDFOOT, V. C.—I think the case turns on the provisions of the Act of 1874; for assuming the Act of 1873 to be in force where credit is given, here there was no length of time specified, and the debt would be payable on demand or so soon as the machinery was *furnished* or *placed* within the meaning of the Act.

Judgment.

The Act of 1874 sec. 2, gives a lien to every machinist, &c., or other person doing work upon or furnishing materials to be used in the construction of any building; or erecting, furnishing or placing machinery of any kind in, upon or in connection with any building, &c., upon such building and the lands occupied thereby or engaged therewith.

And by section 3 the lien shall attach upon the estate and interest, legal or equitable, of the owner in the building, upon, or in respect of which the work is done or the materials or machinery placed or furnished and the land occupied thereby or engaged therewith.

There are few decisions on this Act in our Courts, and none I think affecting the questions discussed on this appeal. Many cases are to be found upon statutes of a similar kind in the various Courts of the United States, but they are very conflicting. I have adopted

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those which seemed to me to be most consistent with the spirit and language of our Act, and which will be found in Mr. *Phillips's* book on Mechanics' Liens.

As between lien-holders *inter se* and for materials furnished to a contractor, there is no lien under this Act, until the materials have been affixed to the building or erection. The Act gives no lien on the materials or machinery furnished as such, but only on the land or the estate of the owner. When they have become affixed, and so form part of the realty, a lien arises in regard to them as part of the land. Until so affixed the parties are left to the remedies in existence before the Act. To use Mr. *Phillips's* language, sec, 176, "The whole object under the Act is to prevent the owner of lands, whatever his estate in them, from getting the labour and capital of others without compensation. Consequently, as long as lumber lay in heaps on the land, it is not subject to the lien under the statute, nor is lumber as such, ever subject to this lien. It is not until it has become part of the land by being converted into realty. * * Again, a lien law provided that persons furnishing any engine or other machinery for any mill, &c., may have a lien upon any building, mill, &c., for which they have furnished materials, and on the interest of the owner of the lot on which it stands. No lien could be acquired upon specific articles furnished for a building, as distinct from the building, but only upon the building in which they were placed, or on the land whereon they were placed, or both."

Judgment.

This I take to be a fair and reasonable construction to apply to the Act of 1874, so that as between the plaintiffs and *Goldie & McCulloch*, the latter can only claim the value of the machinery actually affixed to the building, which appears to be $1,068.45.

A different rule may fairly be applied, in conformity

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with another class of American decisions, as between the material man and the owner, who has himself purchased the materials to be used in the building. The case of *Esslinger* v. *Huebner* (*a*), represents this line of decision. It is there said, "As between material men and the owner of a building, the former has a lien for materials sold to the latter to be used in the building, though not used, and others procured elsewhere. Questions may undoubtedly arise between different material men, where both had sold on the credit of the building, the materials of one having been used in its erection, and those of the other not, which might require the interpretation of a Court of Equity." And Mr. *Phillips* says (*b*), "All the claimant is required to shew is, the fact that the materials were furnished for the purpose of being used in constructing the building. It would be altogether unreasonable to require the material man to follow the materials from his place of business to the building, and to make positive proof of the fact that they were actually used for the purposes for which they were alleged to have been procured." To the same effect is the *Presbyterian Church* v. *Allison* (*c*).

Judgment.

Many cases are cited by Mr. *Phillips* in which the lien, for materials furnished for, but not used in the building, was enforced even against other lien holders, and against the owners who had not purchased them. But it seems to me unreasonable and unjust to give the person furnishing such materials, which have not gone to increase the value of the land, a right to payment out of the property of others which had increased the value, or against the owner who had made no bargain for the purchase of them, and whose property was not benefited by them.

If the rule I have thus adopted be the correct one

(*a*) 22 Wis. 602.
(*b*) Sec. 148. *et seq.*
(*c*) 10 Pen. (Barr.) 413.

as against *Bell*, it must apply with equal force against *Patterson*, his assignee, who can be in no better position in this respect than the insolvent. 1876. Bunting v. Bell.

The contract by *Goldie & McCulloch* was to furnish the machinery and to put it up in the building; in this respect the only witnesses who prove the contract, *Bell* and *McCulloch*, agree; and it is no answer to the claim that they did not complete it, when the default was that of the owner, or if he discharged them from performing it. *Phillips* section 138. Their agreement was not merely to furnish the materials but also the work requisite to place them in position, and it was not terminated by the mere forwarding of the machinery, but remained in force, until discharged by *Bell* from the complete performance of it on the 8th June, 1875.

I shall hold, therefore, that, as against the plaintiffs, *Goldie & McCulloch* had a lien on the 8th June for the value of the machinery affixed to the building, unless the payment of the $1,066 can be taken to have discharged it. But, as the plaintiffs have not appealed, I need not discuss the effect or the application of the payment. Judgment.

As regards the lien for the claim as against the owner, it has to be determined if it has been lost by not proceeding to enforce it pursuant to the Statute.

The lien existed on the 8th June, and proceedings had to be taken within thirty days. On the 7th July and within that time, *Goldie & McCulloch* filed their bill. That bill, in my opinion, was sufficient in form, and under it the lien might have been enforced, and I think it was preserved at all events until the 15th July when the present bill was filed, I attach very little importance to the reservation of *Goldie & McCulloch's*

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rights under the order dismissing their bill, for under the 13th section of the Act of 1874 a bill filed by any lien-holder enures to the benefit of all of the same class, and I see nothing to have prevented *Goldie & McCulloch* dismissing their own bill the day after this was filed, and elect to prove in this suit; and there is no allegation that the proceedings in this suit have been so dilatory as to be a waiver of the lien. *Goldie & McCulloch* seem to have proved their claim as soon as they were called upon to do so.

Judgment.

As the plaintiffs have not appealed I presume they are satisfied with the report, and I might have passed over the consideration of their rights as against *Goldie & McCulloch*. The appeal of the assignee of the owner fails and is dismissed with costs.

Smiles v. Belford.

Copy right—Injunction.

It is not necessary for the author of a book who has duly copy-righted the work in England, to copy-right it in Canada, with a view of restraining a reprint of it there; but if he desires to prevent the importation into Canada of pirated copies from a foreign country, he must copy-right the book in Canada.

Before the author of an English copy-right book is in a position to take any proceeding for the protection, or to prevent the infringement of the copy-right, he must register his book under the 24th section of the Imperial Statute, 5 & 6 Vic. ch. 45.

The bill in this case was filed by *Samuel Smiles*, of the city of London, England, against *Robert J. Belford*, and *Alexander Belford*, of the city of Toronto, printers and publishers, setting forth that in November, 1875, the plaintiff had published a book called "Thrift," written by himself, and which was duly entered by him at Stationers' Hall, London, on the 3rd January following, in pursuance of the requirements of the Imperial

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Statute 5 & 6 Vic. ch. 45, entitled "An Act to amend the law of copyright," and that the defendants had, in defiance of the rights of the plaintiff under that statute, issued a reprint of the work in Canada during the month of April, large numbers of which they had sold at a great profit. The prayer of the bill was to restrain the defendants from thus continuing to infringe the copyright of the plaintiff; for an account of the profits made on the copies of the work already sold and a reference as to the damages sustained by the plaintiff.

The defendants answered the bill, admitting the principal statements therein; claiming a right to reprint in the manner they had done, and insisting that the plaintiff had no copyright in Canada by reason of his default to reprint the book here and enter the same in the office of the Minister of Agriculture pursuant to the Canadian Copyright Act of 1875 (38 Vic. ch. 88), which was duly assented to by Her Majesty, and came into force on the 11th December of that year.

Statement.

The case came on by way of motion for injunction but there being no dispute as to the facts and a mere question of law involved, counsel agreed to treat the motion as a hearing on bill and answer.

Mr. *W. N. Miller*, and Mr. *Biggar*, for the plaintiff.

Sept. 12th.

With a view of obtaining something like a clear view of the plaintiff's rights in this case it will be necessary to look at the state of the law as it existed up to Confederation. The Imperial Act 5 & 6 Vic. ch. 45 sec. 2, defines "*copyright*" to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is in that Act applied. (3). *Copyright in every book which shall* after the passing of this Act *be published in the lifetime* of its author shall endure for the natural life of such

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author, and for a further period of seven years, commencing at the time of his death, *and shall be the property of such author and his assigns*, and if the seven years shall expire before the end of forty-two years from the first publication of the book the copyright shall endure for forty-two years. (11) Provides that a book of registry shall be kept wherein may be registered the proprietorship in the copyright of books. The copy of entry in the book certified under the hand of the officer under the stamp of the Stationers' Company shall be received in evidence in all Courts, *and shall be primâ facie proof of the proprietorship of copyright.* (15) Gives a remedy for piracy by special action on the case (17) renders it unlawful for any one but the proprietor of the copyright, or some one authorized by him, to import into any part of the United Kingdom or into any other part of the British dominions for sale or hire any printed book first composed or written, or printed and published in

Argument.

any part of the United Kingdom, wherein there shall be copyright; and reprinted in any country or place whatsoever out of the British dominions, and a violation of this provision is punished by forfeiture of books, penalty of £10 for each offence and double the value of such book. (24) Requires the proprietor of copyright to make entry in the registry book before he can bring action for infringement, and by this section the entry before suit in the book of registry is necessary although an action can be brought for violations of the Act before registry. See as to this *Copinger* on Copyright, page 72, and cases cited therein. (25) Makes copyright personal property, and by section 29 the Act is extended to the United Kingdom and to every part of the British dominions.

The next legislation on this subject was the Imperial Act 10 & 11 Vic. ch. 95 (22nd of July, 1847), entitled "An Act to amend the law relating to the protection in

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the colonies of works entitled to copyright in the United Kingdom." This Act recites the protection against the importing of foreign reprints, and provides that in case the Legislature of any British possession shall be disposed to make due provision for securing or protecting the rights of British authors in such possession, and shall pass an Act and send it to the Secretary of State, and in case Her Majesty shall be of opinion that it is sufficient it shall be lawful for Her Majesty *to express Her approval of such Act, and to issue an Order in Council declaring* that so long as the Act continues in force the prohibitions contained in the Acts against importing, selling, letting out to hire, exposing for sale or hire or possessing foreign reprints of books first composed, written, printed, or published in the United Kingdom, and entitled to copyright therein, shall be suspended so far as regards such colony and thereupon such Act shall come into operation.

Argument.

By the Consolidated Statutes of Canada, ch. 81, (4 & 5 Vic. ch., 61, sec. 1), any person resident in this Province, or any person being a British subject, who if the author of any book, &c., shall have the *sole right* and liberty of printing such book for *twenty-eight years* from the time of recording the title. (2) Gives a renewal for a further period of fourteen years ; by (4) no person shall be entitled to the benefit of this Act unless he has deposited a printed copy in the office of the Registrar of the Province. (6). No person shall be entitled to the benefit of the Act unless he gives information of copyright being secured by inserting on title page, "Entered according to Act," &c. (7) To entitle any such production to the protection of the Act the same shall be printed and published in this Province. (15) Imposes an *advalorem* duty on the importation of books wherein the copyright is subsisting first composed or written in the United Kingdom and printed in any other country (17). The provisions of sections 15 and 16 are

1876. made subject to orders made pursuant to the Imperial statute, 10 & 11 Victoria.

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Now the Imperial Act 5 & 6 Vic. ch. 45, was in force in Canada up to Confederation (1) owing to the express provisions of section 29 (2) there was no authority to repeal it given to the Legislature of Canada (3), the 17th section of the Consolidated Statutes of Canada ch. 81 expressly provides that sections 15 and 16 of this Act shall be subject to the provisions of the Imperial Act 10 & 11 Vic. ch. 95, and that Act refers to 5 & 6 Vic ch. 15 sec. 15.

The case of *Routledge* v. *Low* (*a*) decides that an author residing in Canada can acquire copyright under 4 & 5 Vic. ch. 45 in England, and that copyright extends over the whole British possesions.

That case was decided after the Consolidated Statutes of Canada ch. 81, and before the Copyright Act of 1868.

Argument.

In that case Lord *Chelmsford*, in giving judgment, says: "Our attention is called to a local law of Canada with regard to copyright, but it was not contended that it would prevent a native of Canada from acquiring an English copyright which would extend to Canada as well as to all other parts of the British dominions although the requirements of the Canadian Act had not been complied with. It is unnecessary to decide what would be the extent and effect of a copyright in those colonies and possessions of the Crown which have local laws upon the subject. But even if the statute of 5 & 6 Vic. applies at all to that case, I do not see how such a copyright can extend beyond the local limits of the law which creates it."

We have now to look at what the law was in Canada

(*a*) L. R. 3 E. & I. App. 100.

up to the passing of the Canadian Copyright Act of 1875—since Confederation. 1876. Smiles v. Belford.

First—The British North America Act recites that the Province of Canada, &c., desire to be federally united into one dominion. Section 91 provides that exclusive legislative authority extends to all matters coming within the classes of subjects therein mentioned of which copyright is one. Section 129 continues the laws in force, subject (except with respect to such as are enacted by or exist under Act of Parliament of Great Britain) to be repealed, &c. It is plain, therefore, that by these provisions the Legislature meant to assert that as between the Provinces the Dominion should legislate about copyright ; but the Dominion Legislature could not repeal English Acts.

The next act is the Copyright Act of 1868, 31 Vic. ch. 54 (22nd May, 1868). Sec. 3 of this Act provides who may have sole right to print for twenty-eight years. (4) Provides for renewals. (6) No person entitled to the *benefit of this Act* unless he has performed certain conditions. (8) He has to give notice of copyright on title page, (9) and republish in Canada. Argument.

Then comes the Statute 31 Vic. ch. 56 (22nd May, 1868), which is An act to impose a duty on foreign reprints of British copyright works, and recites the Imperial Act 10 & 11 Vic. ch. 95, and authorizes the Governor in Council to impose a duty of not over 20 per cent. In pursuance of this enactment an Order in Council of 7th July, 1868, was issued which imposes a duty of 12½ per cent. on all such works.

It is clear therefore that up to this time the Imperial Act 5 & 6 Vic. ch. 45 was in force, because (1), prior to the Confederation Act, and while the Con. Stat. of Canada ch. 81, was in force, it was held in *Routledge*

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v. *Low* that that Act extended over the whole British possessions. (2). The Statute of 31 Vic. ch. 56 recites 10 & 11 Vic. ch. 95, which authorizes the prohibitions enacted by 5 & 6 Vic. ch. 45, against importing reprints to be removed on certain protection being given to publishers. (3). The wording of the Acts as to parties having the benefit of the various Acts and as to parties getting the benefit of them are alike. "No person shall be entitled to the benefit of this Act unless," &c., 4 & 5 Vic. ch. 61; Consolidated Statutes of Canada ch. 81; 31 Vic., ch. 54. (4). The Confederation Act, though it delegates the power to legislate as to copyright, does simply this:—In place of each Legislature legislating as to copyright, as between these bodies the Dominion shall legislate, and section 129 prohibits the Legislatures from legislating against British rights. (5.) The Order in Council of the 7th July, 1868, recites that provision had been made by the Act of 31 Vic. ch. 56, and removes prohibition, so that the plaintiff's rights are

Argument.

governed by the Imperial Act of 1842 as affected by the statutes before the Copyright Act of 1875. See section 30 of the Act of 1875 (38 Vic. ch. 88.)

Then what is the effect of the Canada Copyright Act on parties who acquire copyright in England? The wording as to persons getting the benefit of the Act is but little different from the former Acts. It is made a condition that certain things should be done, but virtually the doing of certain acts was a condition in the other statutes. Again, the reason and object of passing the Imperial Act, to which the Canadian Act was a schedule, was simply (1) because it was thought the Canadian Act was inconsistent with the Order in Council of the 7th July, 1868, and (2) to shew that the Imperial Parliament approved of the Act as a Canadian Act.

The two Acts, viz., the Imperial Act 5 & 6 Vic. ch. 45, and the Canada Act of 1875, can be read together,

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and they, in effect, enact that parties entitled to copyright in England can obtain the right conferred by our Act, and their doing so will enable them to be protected from the importation of reprints; this advantage is given to English copyright owners taking advantage of our Act. This last view gets over the inconsistency of protecting parties selling reprints before the owner of copyright shall have acquired copyright here, and giving no protection to a Canadian publisher who shall have published an edition here, which he may have on hand at the time copyright is given to the owner thereof. See section 15 of the Act of 1875.

Mr. *Beaty*, Q. C., and Mr. *J. C. Hamilton*, for defendants, contended that the plaintiff not having re-published in Canada, under the provisions of the Act of 1875, section 10, had lost all right to obtain a copyright, or to interfere with the defendants' sale of the book in the Dominion.

Argument.

They contended that the Imperial and Canadian statutes were cumulative, and that the provisions in both must be complied with. If repugnant, then the intention of the Canadian Legislature is clear, that the provisions as to re-publishing in the Dominion, must be complied with, and that Act, having been assented to by Royal proclamation, following the Imperial Act, must be taken by implication to have rescinded all former Imperial statutory provisions inconsistent with it.

The present Act was a compromise between English and Colonial publishers. The rights of English authors are provided for and secured on the conditions set out in our statute. To hold that it does not require them to re-publish in Canada, would be practically to deprive Canada of this important branch of trade. Thus the English publisher refusing to reprint here, sells his copyright to United States publishers who, by agreement

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with him, are to have the sole and undisputed right to sell in Canada; the Canadian publisher being refused the copyright, is kept from publishing by the author claiming under the provisions of the Imperial Act. This very state of things has arisen with regard to the book now in question; an edition of it, by Messrs. Harper Bros., of New York, being already in the market. Such a state of affairs could not have been contemplated by our Legislature. As to the effect of the legislation, reference was made to the Imperial Act, 28 & 29 Vic. ch. 63; *Dwarris* on Statutes, p. 530; *Dow* v. *Black* (*a*), *L'Union St. Jacques de Montreal* v. *Belisle* (*b*).

Argument.

Our Copyright Act which, as has been mentioned, came into force on the 11th December, 1875, enacts, "That pending the publication or re-publication in Canada, of a literary work * * the author or his legal representatives or assigns may obtain an interim copy-right by depositing in the office of the Minister of Agriculture, a copy of the title or a designation of such work intended for publication or re-publication in Canada; *the said title* or designation to be registered in an *interim copyright register*, in the said office, to secure to the author aforesaid * * the exclusive rights recognized by this Act previous to publication or republication in Canada, the said interim registration not to endure for more than one month from the date of the original publication elsewhere;" and sub-section two requires such interim registration to be published in the *Canada Gazette*. Then section 11 provides that, "If any other person (1) after the interim registration of any book according to this Act, within the time herein limited, or (2) *after the copyright is secured*, and for the term or terms of its duration, prints, publishes or reprints or re-publishes or imports; or causes to be so printed, published or imported, any copy or any trans-

(*a*) L. R. 6 P. C. 272. (*b*) L. R. 6 P. C. 31.

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lation of such book without the consent of the person legally entitled to the copyright thereof, * * or knowing the same to be so printed or imported, publishes, sells or exposes for sale; or causes to be published, sold or exposed for sale any copy of such book without such consent, such offender shall forfeit * * every copy of such book, and shall forfeit and pay for every copy which may be found in his possession," &c.; and section 15 provides that, "Works of which the copy right has been granted, and is subsisting in the United Kingdom, and copyright of which is not secured or subsisting in Canada, under any Canadian or Provincial Act shall, upon being printed and published; or reprinted and re-published in Canada, be entitled to copyright under this Act; but nothing in this Act contained, shall be held to prohibit the importation from the United Kingdom of copies of such works legally printed there;" and sub-section two permits the sale of foreign re-prints if imported into the country "previous to the date of entry of such work upon the registers of copyrights."

Argument.

Again, the Canadian Copyright Act of 1868, (31 Vic. ch. 54, sec. 6) required all persons taking the benefit of that Act to register, &c., in the office of the Minister of Agriculture, but this Act having been repealed by section 29 of the Act of 1875, the plaintiff had not the power of applying for copyright under it, and he never took any steps to secure it under the Act of 1875, he is, therefore, not in a position now to object to the re-printing of the book by the defendants. This view may be plainly gathered from the opinion expressed during the progress of the confirming Act in the Imperial Parliament. See *Hansard*, 1875, pages 423 and 706, where Lord *Carnarvon* observed that the "Act made the owner of an English copyright secure of a copyright in Canada for 28 years; but on condition that the work should be printed and published in Canada;" and the British North America Act, section 91 sub-section 23, brings

1876. "copyrights" within the powers of the Senate and House of Commons.

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In *Re Goodhue* (*a*), the Court of Appeal discussed the powers of the local Legislature, and held that they are complete within the limits prescribed by the Act of Confederation: and the same must certainly be held in reference to Acts of the Dominion Legislature.

In *The Queen* v. *Taylor* (*b*), the meaning of section 91 of the British North America Act, as to the "exclusive legislative authority" is discussed, and this language, it was considered, referred to the powers of the Dominion Parliament as against the Imperial Parliament, rather than as against the local Legislature (Per *Wilson*, J., page 191). And in the same case on appeal, at page 220, *Draper*, C. J., says: "The power to make laws which is conferred * * is * * a repetition of the language used in the 12th section of 14 George III. ch. 83, and again in the first and second sections of 31 George III. ch. 31. But for greater certainty—not to restrict what had just been conferred—it is declared that (notwithstanding this Act) *the exclusive legislative authority* of the Parliament of Canada extends to all matters coming within the classes of enumerated subjects thereinafter set forth. Exclusive of what? Surely not of the subordinate Provincial Legislatures, whose powers had yet to be conferred, and who would have no absolute powers until they were in some form defined and granted. Would not this declaration seem rather intended as a more definite or extended renunciation on the part of the Parliament of Great Britain, of its powers over the internal affairs of the New Dominion, than was contained in the Imperial Statute, 18 George third, chapter 12, and the 28 & 29 Victoria, chapter 63, sections 3, 4, 5. In somewhat different terms, by section 92, the Legislature of each Province has powers conferred upon it

Argument.

(*a*) 19 Gr. 366. (*b*) 36 U. C. R. 183.

to 'exclusively make laws in relation to matters coming within the classes of subjects * * enumerated,' in that section." 1876. Smiles v. Belford.

PROUDFOOT, V.—The Imperial Statute 5 & 6 Vic. ch. 45 sec. 3, enacted that the copyright in every book which should, after the passing of the Act, be published in the life time of the author should endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and should be the property of the author and his assigns. Sept. 25th.

By the 24th section no proprietor of copyright shall maintain any action or suit, unless before commencing the action he shall have caused an entry to be made in the book of registry of the Stationers' Company, of such book, pursuant to that Act. And by the 29th section it was enacted that the Act shall extend to every part of the British dominions.

It is conceded that this governed the subject of copyright of British authors until the passing of the British North America Act of 1867, but the defendants say that the Imperial Parliament, by this last Act, divested themselves of all power respecting British copyright in Canada. The 91st section, conferred on the Parliament of Canada the power of making laws in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces; and declared that the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes therein enumerated, and among these is copyright. Judgment.

This section 91 is under the division of the statute headed "Distribution of legislative powers." I have not been able to discover anything in the statute conferring any greater powers in this respect on the

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Dominion and the Provinces, than was previously enjoyed by the Province of Canada. There is nothing indicating any intention of the Imperial Parliament to abdicate its power of legislating on matters of this kind. The Parliament of Canada is authorized to make laws "for the peace, order, and good government of Canada." The 14 Geo. III., ch. 83, sec. 12, enabled the Council to be appointed under that Act "to make ordinances for the peace, welfare, and good government of the Province of Quebec," and the 31 Geo. III., ch. 31, created a Legislative Assembly in Upper Canada and in Lower Canada with power "to make laws for the peace, welfare, and good government thereof." And the 3 & 4 Vic., ch. 35, sec. 3, which united the Provinces, gave to the Legislative Council and Assembly of Canada power in similar terms to make laws for the "peace, welfare, and good government of Canada." Under these earlier Acts it was never contended, at all events it is not now contended, that the Provincial Legislature could make laws at variance with those which the Imperial Parliament might choose to pass and declare to have effect throughout the British Dominions; and the language of the 91st section of the last Act has no more ample phrases to indicate larger powers.

Judgment

The Legislature of Canada since the British America Act, recognizes the previous Imperial Legislation on the subject of copyright as still in force in Canada. Thus the 31st Vic., ch. 7, sch. C. had placed upon the list of goods that might be imported free—books, not being foreign reprints of British copyright works—and by 31 Vic., ch. 56, after reciting the 10 & 11 Vic., ch. 95 (Imperial Act), which permitted the importation of pirated books into the colonies in case the Legislature should make due provision for securing the rights of British authors, it empowered the Governor in Council to impose on pirated books a duty *ad valorem*, not greater than 20 per cent, and to distribute it among those entitled to the copyright.

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In 1872, the Dominion Parliament passed an Act on the subject of copyright, which seems to have contained provisions at variance with the Imperial Statute, 5 & 6 Vic., and to which the Royal assent was refused on the ground that the 5 & 6 Vic. was in force in Canada. I have not seen the Act, as it is not in the statutes for that year. And when the Dominion Copyright Act of 1875 was reserved for the Royal assent, doubts were entertained whether it was not at variance with an order of Her Majesty in Council made in pursuance of the Imperial Statute 10 & 11 Vic., ch. 95, and an Act was passed, 38 & 39 Vic., ch. 53, by the Imperial Parliament, to remove the doubts and confirm the bill.

I think, therefore, th atthe Imperial Statutes on the subject of copyright were in force in Canada until the Act of 1875 came into operation (11th December, 1875). It remains to be seen what effect this Act confirmed by the Imperial Parliament has upon the subject.

Judgment.

It enables any person domiciled in Canada or any part of the British possessions, &c., who is the author of a book, &c., to have the sole right of printing, reprinting, publishing, and vending such book, &c., for twenty-eight years from the time of recording the copyright, upon condition that the book shall be printed and published, or reprinted and republished in Canada, but in no case shall the exclusive privilege continue in Canada after it has expired any where else.

The recording of the copyright is provided for by section 7, and other sections make provision for interim copyright pending publication in Canada.

I have no doubt that under this Act British authors may obtain Canadian copyright, conferring upon them the exclusive right of printing, publishing, and vending in Canada, and thus effectually prohibit the

1876. importing, printing, publishing, or sale of pirated copies. (Section 11.)

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But I find nothing in the Act purporting to extinguish the copyright of a British author who does not choose to obtain Canadian copyright. The 5 & 6 Vic. is not attempted to be repealed either by this Act or by the Imperial Statute confirming it. If he does not obtain copyright here, and relies upon his British copyright, he may prevent the reprinting of his work here, but he cannot prevent the importation of pirated copies printed elsewhere, and can only ask for the 12½ per cent. duty imposed on such copies under the 31 Vic., ch. 56.

There is nothing repugnant to the 5 & 6 Vic. in our Act of 1875, they may both well stand together. But it is repugnant to the Order of Her Majesty in Council, under the 10 & 11 Vic., which permitted pirated copies to be imported on payment of a duty, while our Act says, if copyright is secured here pirated copies shall not be imported, and it was on this account that an Act had to be obtained to confirm it.

Judgment.

The 4th section of the confirming Act was referred to as shewing it was contemplated that British authors would have to obtain Canadian copyright. But it only provided, in the interest of British publishers, that no one but the owner of the copyright should import into Britain copies published in Canada of any British copyright book; but it contains nothing to qualify or abridge the British copyright if the author is contented to rely upon it.

In the view I have taken of our Act of 1875 it is unnecessary to consider whether the copyright in Britain is obtained by publication alone, or if registration at Stationers' Hall is not essential. For if it is only upon registration that an author becomes entitled, the plaintiff 's book was registered, and although it was

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after the Act came into force, yet it is optional with him to secure copyright here. But I am quite prepared to hold that registration only affects the right of suit or action, not as it was contended for the penalties only, but of any proceeding for the protection, or to prevent the infringement of the copyright. The 24th section of the 5 & 6 Vic., seems to me expressly to declare this. And in *Murray* v. *Bogue* (*a*), *Kindersley*, V.C., says, "So that, as to books first published after the Act, although the author has the copyright in them, he cannot sue, either at law or in equity, to protect himself against infringement of the Act, unless he has registered his book at Stationers' Hall."

The motion for an injunction was by consent turned into a motion for a decree.

The bill prays for an account of the profits made by the defendants from the sale of the books, and that the damages which have been sustained by the plaintiff from the sale of books may be ascertained, and for an injunction.

Judgment.

I think the plaintiff entitled to an account of the profits from the sale of the books, and to an injunction, and the decree will be accordingly. I give no account of the damages caused to the plaintiff by the sale, as it seems to me to be impossible to ascertain them. The inquiry could not proceed on the assumption that every one who bought a copy of the cheap edition would have bought one of the more costly, and if some assumption of that kind were not made, there would be no data from which to ascertain the damages.

The plaintiff would have been entitled to an order for the delivery to him of the unsold copies, but as he has not asked it, I presume he does not desire it.

The defendants will pay the plaintiff's costs.

(*a*) 1 Drew. 353, 364.

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NICHOLS v. WATSON.

Mortgagor and mortgagee—Purchase of equity of redemption.

A mortgagor having become insolvent his assigneee sold the equity of redemption.

Held, that the purchaser was not bound to make good any deficiency on a sale to realize the security.

Hearing on bill and answer. The facts sufficiently appear in the judgment.

Mr. *W. Cassels*, for the plaintiff.

Mr. *Moss*, for the defendant.

Thompson v. *Wilkes* (*a*), *Shaw* v. *Shaw* (*b*), *Mulholland* v. *Merriam* (*c*), *Howeren* v. *Bradburn* (*d*), *Forbes* v. *Adamson* (*e*), *Turnbull* v. *Symmonds* (*f*), *Fleming* v. *Howden* (*g*), *Leith's* Real Prop. Stats. 352, were referred to.

Judgment. SPRAGGE, C.—The plaintiff is executor of the mortgagee of certain lands and the mortgagor having become insolvent, the assignee sold the equity of redemption of the mortgagor, and the defendant became the purchaser. By section 48 of the Insolvent Act of 1869 the same effect is given to such sales as by the Common Law Procedure Act is given to sales of the equity of redemption by the sheriff.

The bill asks for a sale of the mortgaged premises, and for an order upon the defendant for payment of deficiency. The defendant is content that a decree should go for immediate foreclosure, but resists an order being made against him as prayed, and that is the question between the parties.

(*a*) 5 Gr. 691.
(*b*) 17 Gr. 284.
(*c*) 19 Gr. 288, 20 Gr. 152.
(*d*) 22 Gr. 96.
(*e*) 1 Ch. Cham. 117.
(*f*) 6 Gr. 615.
(*g*) L. R. 1 Sc. App. 372.

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If this had been a sale by a sheriff under execution the mortgagor would not be entitled to such an order, our general order, giving only a *new remedy* in this Court, the Court not creating, and not indeed having the power to create any new liability, as was explained in *Turnbull* v. *Symmonds* (*a*), and in *Forbes* v. *Adamson* (*b*); and the same remark applies to section 8 of the Administration of Justice Act of 1873. It applies to remedies only, and does not assume to create any new liabilities. It is the old difficulty, the want of privity between the plaintiff and the defendant;—whether in such a case there ought to be a direct liability is the province of legislation. The law as interpreted is, that there is none.

It is sought to be placed upon the ground of trust, and *Shaw* v. *Shaw* (*c*), *Mulholland* v. *Merriam* (*d*), and the late case in the Scotch Appeals (*Fleming* v. *Howden* volume 1,) are referred to. But the same difficulty recurs; the plaintiff must be a *cestui que trust*, and in the cases referred to he was held to be so. In the Scotch Appeal case the language of Lord *Westbury*, at page 383, was indeed very general, "An obligation to do an act with respect to property creates a trust;" but it can be only a trust in favour of the person in whose favour the obligation exists; and the same difficulty again occurs, only varied somewhat in shape.

Judgment.

If the mortgagee be not entitled to such order as is prayed for in the case of a sale in execution, how is he entitled to such order after sale by an assignee? the first difficulty is in the language of section 48. It gives the same effect in all respects as to mortgages, &c., as if the sale had been by a sheriff in execution, and adds, "but no other greater or less effect than such sheriff's sale." I do not see how this very explicit

(*a*) 6 Gr. 615.
(*b*) 1 Chy. Ch. 117.
(*c*) 17 Gr. 232.
(*d*) 19 & 20. Gr.

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language is to be got over. What is contended for is, that a sale under that section creates a direct liability on the part of the purchaser which does not exist where the sale is by the sheriff, that surely is giving a "greater" effect than exists in the case of a sheriff's sale.

But suppose that difficulty out of the way, does the insolvency of the mortgagor *per se*, create such direct liability. The nearest analogy in the plaintiff's favor is in the case of rent, referred to in *Story's* Equity Jurisprudence, section 687, a note of which has been sent in to me since the argument. It is in the chapter on "rent," and rent stands upon a peculiar footing. The learned writer puts the case of a derivative lessee, or under tenant, where the original lessee has become insolvent or unable to pay his rent, and says the question would then arise whether the under lessee should be permitted to enjoy the profits and possession of the estate without accounting for the rent to the original lessor; he says there would be no remedy at law, but that in such a case it is "understood" that a Court of Equity would relieve the lessor and direct a payment of rent to the lessor upon a bill making the original lessee, and the under-tenant parties. He gives no case, however, in which this has been done, and looking at the case of *Walters* v. *The Northern Coal Mining Co.* (*a*), disapproving of the decision of Lord *Talbot* in *Clavering* v. *Westley* (*b*), it is very doubtful whether such relief would be given. *Goddard* v. *Keate* (*c*), is referred to for the position that where the original lessee is insolvent, equity will compel an under-tenant or derivative lessee to pay the rent to the original lessor; but it does not amount to an authority for that position, for the bill was dismissed; it only gives countenance to the position by the argument of counsel, that if the first

Judgment.

(*a*) 5 D. M. & G. 629. (*b*) 3 P. Wm. 402.
(*c*) 1 Ver. 87.

lessee had not left assets there might be some reason in equity for charging the defendant. *Walters* v. *The Coal Company* is much against the position. But rent, at all events, stands upon its own footing. See notes to *Goddard* v. *Keate*. We have no instance of direct remedy given in equity to a mortgagee by reason of the insolvency of the mortgagor against the purchaser of the equity of redemption.

I apprehend that there would be no difficulty in working out the rights of the mortgagee in insolvency, and the rights of the assignee against the purchaser of the equity of redemption in the event of the mortgagee claiming as a creditor in insolvency; but no question arises upon that. It is contended as an argument for relief in this Court that without such relief the mortgagee would be without remedy in respect of the covenant of the mortgagor; and his counsel have asked, in case of direct relief against the defendant being denied to him, for a decree for immediate foreclosure as offered by the answer, and the decree will accordingly be for that relief.

Judgment.

The defendant is entitled to his costs. The cause is heard upon bill and answer, and the answer states that before the commencement of the suit the defendant offered to convey to the plaintiff all his equity of redemption in the mortgaged premises, but that the plaintiff refused to accept such conveyance.

1876.

Re Charles—Fulton v. Whatmough.

Will, construction of—Vested interests—Life estates to children—Charity.

A testator devised and bequeathed his real and personal estate upon trust for the benefit of his wife and children in certain proportions and directed that in case of any of his children dying, leaving issue, his or her share should be equally divided amongst such issue or should be divided by the will of such child so dying leaving issue as to such child might seem meet so soon as such issue should attain the full age of twenty-one years; but in default of any of the issue of his children attaining the age of 21 years then the whole of his property was to be applied to found an asylum for the blind and dumb of Toronto.

Held, that the interests of the devisees were not vested—that the children of the testator took only life interests with remainders to his grand-children, and in default of the latter attaining twenty-one to the charity.

This was a motion on petition, for an allowance out of the estate of the testator, by his eldest son under the circumstances set forth in the judgment.

Statement.

Mr. *McGregor*, for the petitioner.

Mr. *J. C. Hamilton*, for the trustees, submitted the matter for the consideration of the Court.

Mr. *Hoskin*, Q.C., and Mr. *Browning*, for the infants.

Proudfoot, V. C.—The testator bequeathed his personal estate to his executors and trustees upon trust to pay debts and legacies, and to invest the surplus in securities. And he devised to his trustees and their heirs the real estate vested in him as mortgagee, and directed that they should be possessed of the stocks, funds, and securities to be purchased by them or which formed part of his personal estate upon trust, to vary the securities as they might think fit, and from the dividends, interest, and income to pay to his wife for life or widowhood an annuity or clear yearly sum of £240 for the maintenance, support and education of his children who should remain at home with

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their mother, single and unmarried, and in case of the death or marriage of his wife the trustees were to apply that sum for the same purpose. He directed that his two sons should receive an education to enable them to take and manage a farm, and were then to be placed with such one of his tenants as the trustees might select, for the purpose of being instructed in the practical management of a farm, and when they respectively attained 21 years of age they should be placed on some one of his farms, not to contain more than 100 acres, half of which at that time is to be cleared farming land, with power to clear more if they desired for the purpose of cultivation, and the sons were to be tenants to the estate, and pay a fair rent, to be determined by the trustees; and his sons refusing so to do to be debarred from any interest under his will. He gave his trustees power to invest such parts of the dividends, interest and income as were unapplied or undisposed of by virtue of the trusts in his will, and to accumulate the proceeds and be possessed of them for the same trusts, intents, and purposes as were declared of the funds from which they proceeded.

Judgment.

The testator also devised his lands to his trustees and their heirs (except certain lands in Lindsay, as to which he made a special provision) as soon as might be after the death of his wife or her second marriage, and after his youngest child attained 21 years of age to sell and stand possessed of the proceeds; first, to pay costs, charges, and expenses in the performance of the trusts, and then to hold and apply the residue upon the same trusts declared concerning the residue or surplus of his personal estate.

And he declared that the real estate from time to time unsold, and the rents accruing from it, should be to all intents and purposes whatsoever considered and deemed as personal estate.

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And as to the residue of the trust moneys, stocks, funds, and securities, and the dividends, interest, and income arising therefrom, or the interest and income thereof, he directed that after the death or second marriage of his wife, and as soon as his youngest child attained 21 years of age his trustees should hold the same in trust for his daughters *Charlotte*, *Sarah*, *Anna*, *Margaret*, and *Lucy*, and his sons *James* and *John*, in equal shares as tenants in common.

If any of his said daughters and sons should die under the age of 21 years without leaving a child or children, then the share or shares provided for the daughters or sons so dying, should go, remain, and be to the others of his said sons and daughters.

In the meantime, until the shares provided for the children of his daughters and sons should become vested in them under the trusts thereinbefore declared (this must mean impliedly declared); the trustees should apply the interest and dividends for the benefit of the children entitled in expectancy to such shares.

Judgment.

The share or shares of any of his daughters and sons who might die without leaving issue were to be divided equally among the residue of his children.

But any of his children so dying, leaving issue, the share of such one so dying should be divided equally among said issue, or should be divided "by the will of such of my children so dying leaving issue as to such child of mine may seem meet, so soon as such issue shall have attained the full age of 21 years."

And in default of any issue of his children attaining the age of 21 years then the whole of his estate was to be applied to founding an institution for the dumb and blind in the city of Toronto.

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Re Charles.

James W. Charles, one of the sons who has attained 23 years of age, applies to have it declared that he is entitled to have a farm allotted to him, and to be furnished with means for stocking the same out of the estate, and to have a sum given to him for that purpose.

John S. Charles, the youngest child of the testator, will come of age in October next (1876.)

I was informed that the case had been before the Chancellor, who held that an advance might be made to the petitioner out of his share.

I have referred to the Chancellor's note of the case when he declined to make the advance *then*. He then proceeds :—"As to *John* (*James*) he is of age, so there is no benefit of survivorship under the will. If he should take a farm as a tenant, as provided by the will, and should thereupon ask for an advance, it will be proper to consider whether he can have it, being an adult, upon any principle that is applicable to the case of advances to infants. It would be by way of advancement, and in order to a settlement in life, as contemplated by the will, and would be in anticipation of the period of distribution."

Judgment.

I apprehend that only the clause giving benefit of survivorship in case of death under 21 without leaving children could have been brought to the notice of the Chancellor, as he speaks of there being no benefit of survivorship to the others after a devisee attains 21, and he must, therefore, have considered each devisee on reaching 21 entitled absolutely to his share.

I do not think this the true construction of the will, for there is another clause which extends this benefit of survivorship to the case of death at any time.

In case of death at any time leaving issue the devisee may appoint by will among the issue, and in default they take equally.

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If all the devisees die without issue who shall attain 21 then the property is given for the Dumb and Blind Asylum.

Now where real estate is directed to be converted and bequeathed to *A*, and if he shall die without leaving issue then over, *A* would take not the absolute interest, but the entire interest of the testator defeasible on his leaving no issue at the time of his death (*a*).

In *Murphy* v. *Murphy* (*b*), *Strong*, V. C., held that on a devise of an estate in trust to sell and divide when the youngest attained 21, the children took vested interests as each attained 21; and in *Murphy* v. *Mason* (*c*), I held that until the youngest attained 21 no child could call for a distribution or division of the estate.

There was no clause in that will giving benefit of survivorship in case of death without issue prior to the period for distribution, which was the reason for deciding the interests to be vested. Here there is such a clause, and, therefore, the vesting does not take place before the youngest attains 21.

Judgment.

But assuming it to be vested, it is liable to be divested on death without leaving issue; and if the legatee leaves issue it goes to the issue. It seems to be nothing more than a life interest in the children, with remainder to the grand children; and in default of the latter, to the charity.

This appears to be the necessary result of *O'Mahoney* v. *Burdett* and *Ingram* v. *Soutten* (*d*), where it was held that on a gift to *A.* for life, and on her death to *B.*, and if *B.* died without children then over, the contingency of dying without children referred to the death of *B.*, not the death of the tenant for life. The rule is

(*a*) 2 Jarm. 437.
(*b*) 20 Gr. 575.
(*c*) 22 Grant 405.
(*d*) L. R. 7 H. L. 388, 408.

otherwiseif a different intention is to be found in the will. But in this case the provisions seem to favour the rule; for there is an expression applicable to dying without issue in the life of the tenant for life and under 21; and another on dying without issue generally. 1876. Re Charles.

Assuming that the petitioner, notwithstanding his majority, would have the same right to an advance as an infant would have, is this a case in which an infant would be entitled to an advance?

The same rules apply to advances as to maintenance, with this qualification: that advances are less readily made than maintenance afforded (*a*).

To entitle to maintenance the interest of the legatee must be vested in possession (*b*), and not subject to a contingency (*c*). And where there are devises over, or parties entitled in remainder to a contingent or post-poned gift, their consent must be obtained, or if it cannot, as where children unborn, &c., no maintenance is given (*d*.) Judgment.

As the interest of the legatee here is not vested in possession—as it is liable to be defeated upon a contingency—and as there are devisees over whose consent cannot be obtained, I think the petitioner is not entitled to the advance.

I regret the conclusion to which I have arrived, as it is difficult to imagine the testator had any such design in view. But it is out of my power to make a will for him, and the will he has made seems to preclude any other conclusion.

As the will is an obscure one, and the difficulty of construction is the testator's act, I think all parties may have their costs out of the estate.

(*a*) Chambers 380, 381. (*b*) Simpson on Infants, 242.
(*c*) Simpson on Infants 242. (*d*) Ex parte Kebble 11 Ves., 604.

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COWAN v. WRIGHT.

The Presbyterian Church in Canada—Voting out of union—Meeting called irregularly—Injunction—Ultra vires—Irregular voting.

The Act passed for the union of the several Presbyterian Churches named therein (38 Vic. ch. 75)) provides (by section 2) that any congregation in connection or communion with any of them may, at a meeting of the congregation regularly called according to the constitution of such congregation or the practice of the church with which it is connected determine, by a majority of the votes of those entitled to vote, not to enter the union, and in such case the congregational property of such congregation shall remain unaffected. By "The Model Constitution" of one of the churches, and by which certain congregations, who had assumed to vote themselves out of the union, were governed, such meetings are to be called by public intimation after divine service on, at least, one Sabbath ten days previous to the day of meeting, and the decisions are to be by a majority of votes of the male persons present of the full age of twenty-one who are members or adherents of the church and who reside within the bounds of the same. The meeting at which a congregation had attempted to vote itself out of the union was called on the 12th and held on the 13th, and the voting thereat was confined to the male communicants over the age of twenty-one years.

Held, that the vote was invalid, and that the congregational property was vested in the trustees for the use of the congregation of the united body.

In the case of another congregation such vote was taken, not at any meeting of the congregation but by depositing votes in the collection plate for two successive Sundays.

Held, that this vote was also invalid and the same results followed as to the property of the congregation.

Where the members of a congregation of the Presbyterian Church had attempted to vote themselves out of the union of the Churches effected by the Statute (38 Vic. ch. 75)) but by reason of their irregular proceedings had failed to do so, an injunction was granted at the instance of the members of the body who had gone into the union, to restrain the dissenting portion of such congregation from interfering with their use of the church.

The Act of Union of the Presbyterian Churches (38 Vic. ch. 75) professes to deal with the college at Montreal and at Quebec and with other funds outside of the Province of Ontario.

Held, that although, in respect of these matters, the Act was *ultra vires*, this did not invalidate the whole Act.

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This case and the case of *Hall* v. *Ritchie* (reported herewith), were set down for hearing at the London sittings in May, 1876, and were subsequently argued together at Toronto.

The plaintiffs in each case filed a bill for an injunction to restrain the defendants from preventing or interfering with the plaintiffs in the use and enjoyment of certain church properties to which they claimed to be exclusively entitled, by virtue of the Statute 38 Vic. ch. 75 (Ont.,) and the Union of Presbyterian Churches effected within the meaning of that Act, on 15th June, 1875.

In this case the plaintiffs claimed that the property which previous to the Union was the property of the London (Ont.) congregation of the Presbyterian Church of Canada in connection with the Church of Scotland, became the property of the plaintiffs, they being that part of the same congregation which entered into the Union contemplated by the statute which was, they alleged, duly consummated in Montreal on the 15th June, 1875, when the Moderators of the four Presbyterian bodies named in the statute, including that in connection with the Church of Scotland, duly signed the articles of Union, and then became "The Presbyterian Church in Canada." And in *Hall* v. *Ritchie*, the plaintiffs in like manner claimed the property of St. Andrew's Church, Bayfield, on the same grounds.

The defendants in each case resisted the claim on similar grounds, differing only in some minor particulars. These grounds of defence were more fully stated in the suit of *Hall* v. *Ritchie*.

Argument.

Mr. *Maclennan*, Q. C., for the plaintiffs in both cases. The plaintiffs representing the congregations of the old church which entered the Union, and being now the only congregations, in *London* in the one case, and

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Bayfield in the other, which belong to the united church (*i. e.*, The Presbyterian Church *in* Canada), are by force of the statute respectively entitled to the properties in question. The fact of Union being proved as it has been in accordance with section 11 of 38 Vic. ch. 75, and the plaintiffs being proved to have gone into the Union, these properties are, by force of section 1, *primâ facie* vested in the plaintiffs, and it rests with the defendants to shew, if they can, that they are entitled, by virtue of the alleged proeeedings, under section 2 of the Act to hold the property.

It is admitted that the defendants have interfered with the plaintiffs' rights to this property since the Union, and the latter having the right to the exclusive possession of the property are entitled to an injunction to restrain further interference by the defendants.

Argument.

Mr. *J. Hillyard Cameron*, Q. C., and Mr. *Fenton*, for defendants in *Hall* v. *Ritchie ;* and Mr. *Duncan McMillan*, for defendants in *Cowan* v. *Wright.*

The Statute 38 Vic. ch. 75, is *ultra vires.* None of the four churches named in the Act were ever domiciled wholly within Ontario, and some of them wholly beyond it; part only of the property, collegiate institutions and funds, with which the Act affects to deal, being within the Province and the residue wholly without it. The Union contemplated by the Act must be held to have been based on the complete transfer of all the properties, institutions, and funds being legally effected and carried out, and such must in fact be held to be the *consideration* for the Union. The Ontario Act being clearly insufficient to affect such of these properties, funds, and institutions as are without the Province the consideration for the Union fails, and so what the Union contemplated *was* in law never effected. The corresponding statutes passed in the other Provinces

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to aid in accomplishing the Union, and to deal with the properties there, differ in many respects from the scheme contemplated in the Ontario Act *e. g.*, the Quebec Act 38 Vic. ch. 62, gives two years to dissenting congregations to vote themselves out of the Union, whilst the Ontario Act gives six months only, and the properties in Quebec which our statute shews are to be dealt with in one way, are in fact dealt with by the Quebec Statute in a totally different manner.

The whole question of these church properties as regards this Union could only be dealt with by the Parliament of Canada and not the Provincial Legislature. *Re Goodhue* (*a*).

Argument.

The Bayfield church property is held under a trust deed expressly declaring that it is the true intent and meaning of the trust, thereby declared "that they, the said congregation of Bayfield shall, so long as they remain in connection with the Presbyterian Church of Canada in connection with the Church of Scotland, and shall be and remain a congregation thereof, fully and freely enjoy the said property for the purposes of the said Church and the maintenance and support thereof;" and the defendants being dissenters from the Union and the original congregation in Bayfield who remain faithful to the Church of Scotland, the property continues theirs, and does not pass with the plaintiffs who having gone into the Union, and who are in fact seceders from the Old Church and lose all rights to the congregational property under the trusts of the deed. *Attorney General* v. *Jeffrey* (*b*), *Attorney General* v. *Christie* (*c*), *Craigie* v. *Marshall* (*d*).

Even if the Ontario Act, 38 Vic. ch. 75, is valid and applicable to the property in Bayfield—the right of the

(*a*) 19 Gr. 366.
(*b*) 10 Gr. 293.
(*c*) 13 Gr. 495.
(*d*) 12 Court of Session N. S. 547.

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plaintiffs is dependent on the Union contemplated by the statute being duly carried out according to the rules of the Church of Scotland.

These rules were disregarded by the Union party in the Synod who, being in the majority, ignored the law of the Church, known as the "Barrier Act," which, requires every enactment of Synod, intended to bind the whole body, to be sent down to Presbyteries after being enacted and to have force only for one year, unless a majority of the Presbyteries failed to report against it to the Synod of the following year. The resolution or enactment of the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland to enter the Union was not finally adopted until November, 1874, and this enactment was never afterwards sent down to the Presbyteries as required by the Barrier Act, but the majority of Synod in direct violation of it proceeded *vi et armis* to consummate the alleged Union,

Argument.

but real secession, on the 15th June, 1875, and this illegal act does not bind the defendants, who never assented to the Union, but always opposed it.

Even if the Union was legally effected, still the defendants are entitled to the property under section 2 of the Act 38 Vic. ch. 75, having at a meeting of the congregation called on the 12th and held on the 13th December, 1875, in St. Andrew's church, Bayfield, decided by a majority of the votes of male communicants over 21 years of age to dissent from the Union.

The defendants in *Cowan* v. *Wright* are entitled to the property in London, the congregation they represent having by a large majority declared their intention, by votes deposited in the collection plates on two successive Sundays, to adhere to the Church of Scotland and dissent from the proposed Union, and this mode of voting was the one commonly

followed in the London congregation, and not opposed by the plaintiffs or any one.

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Mr. *McLennan*, in reply. The meetings and voting relied on by the defendants in both cases were irregular and contrary to the "Model Constitution" governing these congregations.

BLAKE, V. C.—On this case coming before the Chancellor on the motion for injunction he granted that which had been asked by the plaintiffs. As there was no material change in the evidence adduced at the hearing from that used on the motion for injunction, following *Weir* v. *Mathieson* (*a*), I was bound, whatever impression I might have formed as to the plaintiffs' title to relief, to grant a decree in the terms of the order already made. At the request of the counsel I have considered all the matters presented to me, although in the view I take it is not necessary to refer to much that was argued before me.

Judgment.

The plaintiffs allege that the premises in question belong to the body which they represent, while the defendants contend that the Act which the plaintiffs rely on to effect this, being beyond the powers of the Legislature which passed it, is inoperative, and that if this be not so, as a dissenting congregation, they have voted themselves out of the Union, under section 2.

The Act complained of by the defendants, 38 Vic. ch. 75, had to do with the temporalities of the various bodies therein referred to. This Act is based upon the proposition that these bodies, having met and agreed upon the terms of Union, it was reasonable that the Legislature of Ontario should aid them so as to allow the property in this Province to be held in the manner prescribed in the agreement which forms the basis of

(*a*) 11 Gr. 383.

1876. this legislation. The Act deals with the property of these bodies in this Province, and the civil rights pertaining thereto, and in respect of such matters, I take it now to be clearly settled that this Legislature is supreme. The view of our Court of Appeal on the subject is clear. There was a conflict as to the effect of the enactment in question in *Re Goodhue* (*a*), but as to the power of passing a statute, as to which the Court was pleased to say that the Legislature enacting it must have been "*magnas inter opes inops*," the Court felt no doubt. As to this enactment thus characterized, the Chief Justice of the Court of Appeal, says (*b*):—

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"No English authority has been cited, nor do I think there is any which would warrant our denying the power to pass such an Act. There may be cases in which the decisions look in the direction of neutralizing the enactment by construction, or in which a long series of decisions have, as it were, fined away the force of the language used, so as apparently to dis-

Judgment.

appoint the intention of its framers. * * Among the classes of subjects with regard to which exclusive power is given to the Provincial Legislatures to make laws, we find 'property and civil rights in the Province,' and 'generally all matters of a merely local or private nature in the Province,' I cannot say that the present is not a matter belonging to one or other of these classes. * * (*c*) I think nothing is to be gained by a theoretical distinction which has been suggested between the authority of the Legislature to pass laws upon certain subjects, and the right to exercise that power as they may deem fitting. Whether it be called a power or a right, it comes to the same thing; since, though our Legislature is limited by the constitutional Act to certain defined subjects, the Act imposes no limit to the exercise of the power on those subjects. It does provide checks, for the Lieutenant-Governor

(*a*) 19 Gr. 366. (*b*) p. 381. (*c*) p. 385.

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may withhold the necessary assent, or the Governor-General may disallow Acts to which his subordinate has assented; but if these powers are not exercised, however self-evident to other minds the propriety or duty of such exercise, and if the new law be within the class of subjects committed to the Provincial Legislature, I know of no authority in Provincial tribunals to refuse to give it effect, applying to its language the same rules of construction that are applicable to any other statute passed by competent authority. * * (*a*) Conceding to the fullest extent that the powers of the Legislature of Ontario are defined and limited by the British North America Act of 1867, I conceive that, within those limitations, Acts passed in the mode described by that statute are as to the Courts and people of this Province supreme." In the same case the Chancellor says (*b*): "The true principle, I take shortly to be, that under the Confederation Act there has been a Federal, not a Legislative Union; that to the Provincial Legislature is committed the power to legislate upon a range of subjects which is indeed limited, but that within the limits prescribed the right of legislation is absolute," and the view of Mr. Justice *Strong* is thus expressed (*c*), "By section 92 of the British North America Act the exclusive power to legislate is, amongst other matters, conferred on the Local Legislatures as regards 'property and civil rights in the Province and generally in respect of all matters of a merely local and private nature in the Province.' It must be from one or the other of these sources that the power to pass private Acts of Parliament affecting private property is derived. That the Legislature have that power in all cases where the property and rights sought to be affected are 'in the Province,' to the same unlimited extent that the Imperial Parliament have in the United Kingdom, I have not the slightest doubt." The judgment of the

Judgment.

(*a*) p. 386. (*b*) p. 418. (*c*) p. 452.

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Court in *Re Goodhue* is strengthened by the conclusion arrived at in the Privy Council in *L'Union St. Jacques de Montreal* v. *Belisle, and Dow* v. *Black* (*a*), where the Judicial Committee refused to concede that the Local Legislatures had only the limited powers which it was argued they possessed. The preamble to the statute in question sets out plainly the position of matters on which the Legislature acted, and what it is that it desired to accomplish. "Whereas the Canada Presbyterian Church, The Presbyterian Church of Canada in connection with the Church of Scotland, the Church of the Maritime Provinces, in connection with the Church of Scotland, and the Presbyterian Church of the Lower Provinces, have severally agreed to unite together and form one body or denomination of Christians, under the name of 'The Presbyterian Church in Canada;' and the Moderators * * * by and with the consent of the said General Assembly and Synods, have by their petitions, stating such agreement to unite as aforesaid, prayed that for the furtherance of this their purpose, and to remove any obstructions to such Union which may arise out of the present form and designation of the several Trusts or Acts of incorporation by which the property of the said churches, and of the colleges and congregations connected with the said churches or any of them respectively, are held and administered or otherwise, certain legislative provisions may be made in reference to the property of the said churches, colleges and congregations situate within the Province of Ontario and other matters affecting the same in view of the said union." The last clause of the Act defines when the Union referred to is to take effect, "The Union of the said four Churches shall be held to take place so soon as the articles of the said Union shall have been signed by the Moderators of the said respective Churches." The first

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(*a*) L. R. 6 Pri. Co. 31-272.

clause of the Act declares the effect of this signing of the articles. "As soon as the Union takes place, all property, real or personal, within the Province of Ontario, now belonging to or held in trust for or to the use of any congregation in connection or communion with any of the said Churches, shall thenceforth be held, used and administered for the benefit of the same congregation in connection or communion with the united body under the name of 'The Presbyterian Church in Canada.'"

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The position of matters up to this point appears shortly to be as follows: Four bodies of Christians in the Dominion desire to unite; they enter into an agreement to that effect; some of them possess property in the Province of Ontario; they express to the Legislative body of the Province the desire for Union, and ask that the property belonging to them respectively in that Province, may be held and administered for the benefit of the united body; the Legislature had the right to take from one body in Ontario the property belonging to it situate in that Province, and to give it to another and, having this power it surely could say to those asking for such legislation, let the property, at present belonging to these distinct Churches, be in the future held by that which will then represent them—a united body in place of divided churches. The Legislature might then and there have so dealt with the property in question, notwithstanding the Barrier Act and any other ordinary requirement which as a rule precedes church legislation. Parliament chose to place but the one condition to the consummation of the Union and to the passing over of the property in question to the newly-formed church, and that was the signing of the articles of Union by the Moderators of the respective churches. It was not, to my mind, at all unreasonable that the Legislature should have prescribed this formal proceeding as the close of the contest

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between the unionists and the non-unionists. For years the minds of the members of these various churches had been turned to the consideration of this question. It had been the subject of discussion amongst individuals, in the churches, sessions, presbyteries, synods, and assemblies—all were alive to the points at issue. The Barrier Act, in the modified shape in which it was passed in this country as compared to that Act in Scotland, as well as the other rules and forms of the various churches which precede legislation, had been all followed out in the spirit if not to the letter, and as a result we find an almost unanimous conclusion that the minor differences, which separated those who had so much in common, were all to be sunk and the great scheme of Union which it was thought would add so much to the power, vigour and life of this branch of the Church, was to be carried out. It was clear that the non-unionists were beaten in the contest. This was apparent from what had taken place prior to the passage of the Act in question, and it was therefore not unreasonable that the Legislature should have listened to the voice of the large body of men applying to them and should have enabled them to effectuate that which was the wish of the churches as displayed in the records of the proceedings which had then taken place. It was proved before me that the Moderators referred to in the Act had signed the articles as required, and from that time the premises in question became the property of the congregation represented by the plaintiffs to be held and used for the benefit of such congregation in connection with the united body, subject, however, to the provision contained in the second section of the Act.

Judgment.

I have not overlooked the argument that, as this Act deals or professes to deal, with the college at Montreal and Quebec, and with certain funds outside of Ontario, it is at all events thus rendered *ultra vires*.

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I do not think the whole Act should be invalidated for any such reason. If the Legislature of Ontario has the power to pass the property in this Province of the four bodies to the united body, and it passes an Act sufficient for that purpose, I do not think it is invalidated, because it may include in such properties a piece of land situated without its jurisdiction, and with which it cannot effectually deal. If "The Presbyterian Church in Canada" relies on this Act as the means of vesting in them, these rights and properties situate in Quebec, a question may be raised as to rights and properties so located, but this point is not before me for decision in dealing with property in this Province. It was further urged that, as by one general agreement all that was sought by these churches was to be carried out, and, as this agreement included property not within the jurisdiction of this Province, and consequently this Legislature could not consummate that which was sought, the agreement failing in part, could not be enforced and it must be concluded that the arrangement failed in toto. The difficulty which might have arisen from such a position it is not here necessary to consider, as the Acts of the other Parliaments of the other Provinces are produced, shewing that such portions of the agreement as were *ultra vires* of the Legislature of Ontario had been dealt with by the tribunals which can rightfully legislate thereon. The whole ground covered by the agreement—the basis of union, has been passed upon by the Legislatures empowered to make laws in respect thereof.

Judgment.

The hardship which might have been urged had not the Legislature made provision in regard to those congregations which dissented from the Union is removed by the 2nd section of the Act: "Provided always, that if any congregation in connection or communion with any of the said churches, shall at a meeting of the said congregation regularly called according to the constitution

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of the said congregation, or the practice of the church with which it is connected, and held within six months after the said Union takes place, decide by the majority of the votes of those who, by the constitution of the said congregation, or the practice of the said church with which it is connected, are entitled to vote at such a meeting, determine not to enter into the said Union, but to dissent therefrom, then and in such case the congregational property of the said congregation shall remain unaffected by this Act, or by any of the provisions thereof."

It is urged by the defendants that under this clause such steps have been taken that the congregation has been lawfully withdrawn from the Union. The congregation represented by the defendants was bound by the regulations set forth in the "Model Constitution," and by these rules they were, under the clause of the Act before referred to, bound to ascertain the decision of the congregation. This, it appears to me, they have scarcely even attempted to do. A notice was not given ten days preceding the meeting. At the meeting there was no voting, and all there present, whether male or female, over or under twenty-one, communicants, members, adherents or persons merely then present were allowed to hand in cards which, on a subsequent day were investigated by persons called scrutineers.

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By section 2 of the model constitution the mode of appointing trustees is thus defined: "They shall be elected at a meeting of the congregation called for the purpose by public intimation after divine service, on at least one Sabbath, ten days previous to the day of meeting. They shall be chosen by the majority of votes of the male persons present, of the full age of twenty-one years, who are members or adherents of this church, and profess their intention to support religion in this congregation, and who reside within the bounds of the same."

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Article VIII. declares that "The temporal affairs of the church shall be managed by a Committee of not less than five. * * * The manner of election shall be as in Article II."

Article VI. provides that "A majority of male communicants of at least three months' standing on the roll, and free of church censure, in order to render the call valid" shall be needed to the call of a minister subsequent to the first called. This clause of the model constitution was amended in 1867 by extending the right to female communicants.

The mode of notifying the congregation of such meeting is the same as that set out in section 2: "All meetings for the election of a minister shall be called by authority of the Presbytery by public intimation after divine service, on at least one Sabbath ten days previous to the day of meeting."

Judgment.

Section 12 does not aid in determining the proper mode of calling meetings of the Church other than the annual meetings. By this constitution a day certain is fixed for such annual meeting; the work to be then transacted is defined. The day being thus fixed it is not necessary to do more than remind the congregation thereof and this is to be done "by public intimation after divine service on the preceding Sabbath;" at this meeting we have another constituency, it "shall consist of all male persons above twenty-one years of age, who shall be supporters of the ordinances of religion therein."

The question involved had to do with that which the Act calls "The congregational property of the said congregation." All meetings held, saving the exceptional case of the annual one, are to be called in the manner prescribed in sections 2, 7, & 8, and when

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such meetings deal with the temporalities of the church they are to be composed of "the male persons present, of the full age of twenty-one years, who are members or adherents of this church, and profess their intention to support religion in this congregation, and who reside within the bounds of the same."

Neither of these requirements has been complied with and, therefore, I must find that the congregation in question has not voted itself out of the Union, and, consequently, that the defendants have not the rights they claim, and I must make perpetual with costs, the injunction already granted against them.

Hall v. *Ritchie* was argued with *Cowan* v. *Wright*. The main facts of this case differ but slightly from that which I have just disposed of. In *Hall* v. *Ritchie*, there was an actual voting; communicants alone were allowed to vote; notice of the meeting was not given until the Sabbath immediately preceding the day on which the meeting was held; it is alleged that of the actual communicants a majority was favorable to the Union. The congregation in this case was organized in 1860, and it is admitted by the defendants that the model constitution governs them. This being so the notice, not having been given until the Sabbath preceding the meeting, is clearly too short, and the rejection of certain voters and the confining the right to vote to communicants are also plainly not warranted by the constitution which binds the congregation in question. I must find also in this case that the plan pointed out by the Act for the congregation to vote itself out of the Union has not been followed, and, therefore, that it is not entitled to deal with the premises in question in the manner complained of. The decree will be, as in *Cowan* v. *Wright*, with costs.

Judgment.

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Dominion Savings & Investment Society of London v. Kittridge.

Mortgages—Tacking—Consolidating mortgages—Costs—Registry Act.

The rule of Equity which allows the holder of several mortgages created by the same mortgagor on separate properties to consolidate the debts and insist on being redeemed in respect of all before releasing any one of his securities is not "tacking," and is not such a claim as the Registry Act declares shall not be allowed to prevail against the provisions thereof.

Although in such case the holder has the right of refusing to be so redeemed in respect of one of the securities, yet he may by his acts deprive himself of this advantage.

The plaintiffs were mortgagees of lots 27 and 29, created by the same person, and *K.* being about to purchase the equity of redemption in 29 wrote to the secretary to ascertain the amount due thereon, adding, "How is it made up, as I would like to take it up?" The answer was, "$741 will pay off * * * loan on lot No. 29 * * * if paid before 1st February, 1875." Subsequently *K.* enclosed to the Secretary his check for first instalment saying, "I wish to pay your mortgage on this property, or pay it up and take assignment at some future time if necessary, as I hold the second mortgage on it and make this payment on that condition," which the Secretary acknowledged the receipt of as "first instalment, interest and costs on *J. S. L.*'s first loan."

Held, that under the circumstances the company were precluded from afterwards insisting on their right to be paid the amount secured on lot 27 before releasing lot 29 to the injury of *K.*, who had subsequently purchased the equity of redemption; and this although at the time of making such inquiry *K.* was aware of the mortgage on lot 27, and had dealt with the mortgagor in respect thereof by accepting a second mortgage.

Mortgagees having insisted on their right to consolidate two mortgages as against a purchaser of the equity of redemption in one of the properties, which claim was decided against them, were ordered to pay the costs up to the hearing, that being the only point raised thereat.

This bill was filed by *The Dominion Savings and Investment Society* against *Alfred Hamilton Kittridge* and *George Mansfield*, assignee of *James S. Loughead*, an Insolvent, setting forth that on the 9th of August, 1873, *Loughead* had mortgaged lot No. 29, on the south

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side of Albert Street, in the town of Strathroy, for securing the payment of $796.50 in yearly instalments of $159.30 on the first day of August in each year, and in default of the payment of any portion thereof the whole became payable. That by another mortgage, dated the 26th September, 1873, *Loughead* conveyed to the plaintiffs lot No. 27, in Blackburn's survey in the same town of Strathroy, securing the payment of $1051.60 in yearly payments of $212.32.

The bill further stated that default had been made in payment of a portion of the two first instalments of the first mentioned mortgage, and claimed that there was still due thereon $624.40, and on the last mentioned mortgage $1154.70; that subsequently to the execution of these mortgages, and on the 27th January, 1874, *Loughead* mortgaged both the said lots to defendant *Kittridge*, and afterwards, and on the 27th day of August, 1875, *Loughead* sold and conveyed to *Kittridge* all his interest in the said lot No. 29 charged notice by *Kittridge*, when he obtained his mortgage and took the conveyance, of both mortgages in favour of the plaintiffs, and claimed that the plaintiffs' were entitled to unite their said securities as against *Loughead* and all persons claiming under him subsequently to the said second mortgage to the plaintiffs, and that he and they were not entitled to redeem either parcel without paying off the whole amount due to the plaintiffs in respect of both mortgages, and prayed relief accordingly.

Statement.

The defendant *Kittridge* answered admitting the principal statements of the bill, but insisting that under the circumstances existing in the case, and which are clearly set forth in the judgment, he was entitled to obtain a release or discharge of the mortgage held by the plaintiffs on lot No. 29 on payment of the amount due thereon without being obliged to pay the sum secured on lot No. 27 by the second mortgage in favour of the plaintiffs.

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The cause came on for the examination of witnesses and hearing at the sittings of the Court at London, in June, 1876.

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The effect of the evidence given is clearly stated in the judgment.

Mr. *Boyd*, Q. C., for the plaintiffs.

The right here claimed by the plaintiffs to unite their two mortgages as one claim is clear as a principle of law; the only question is, whether what is shewn in evidence is sufficient to displace that right.

One important question to be solved in such a case is, whether or not the party to whom the information is said to have been given has changed his position in consequence of what has been told him. Here we say *Kittridge* did not change his position, as he actually accepted his conveyance before receipt of the letter from the secretary: *Haynes Gillen* (*a*). Besides, here defendant had actual notice of the claims of the Society, for when he took his mortgage on lots 27 and 29 he saw the mortgages in favour of the plaintiffs, and he had thus notice of the equity to which they were entitled.

Argument.

Buckler v. *Bowman* (*b*), *Hyman* v. *Roots* (*c*).

Here no statement was made which could bind the the plaintiffs, as there was nothing to shew the secretary that the defendant was about to make advances.

Moffat v. *Bank of Upper Canada* (*d*), and *Royal Canadian Bank* v. *Cook* (*e*), shew that under these circumstances the holder of a mortgage is not bound by the statement made.

Mr. *Magee*, for the defendant.

(*a*) 21 Gr. 15. (*b*) 12 Gr. 57. (*c*) 10 Gr. 340.
(*d*) 5 Gr. 374. (*e*) 20 Gr. 1.

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Apart from the Registry Laws the right af *Kittridge* to succeed is plain; for up to March, 1875, neither party ever thought of there being any right to consolidate the mortgage debts; and on the 16th of that month the plaintiffs accepted defendant's payment of $193.70 on tbe condition that on payment of the mortgage thereon there would be a discharge of lot 29, or an assignment of the mortgage held by the plaintiffs. They accepted this money and they must now fulfil the terms on which it was paid and received.

Counsel also contended that this was a plain case of tacking, which is expressly provided against by the Registry Act.

Judgment.

Blake, V. C.—On the argument it was conceded by Counsel for the defendants, that, except for the registry laws, and the conduct of the plaintiffs in connection with the defendant *Kittridge's* advance of money, the plaintiffs were entitled to hold both parcels of land until satisfaction of the two mortgages held against them. The general rule that a mortgagee can hold two mortgages on different properties given by the same mortgagor until payment of both mortgages, even where one of the properties finds its way into the hands of a purchaser, is too well established to be now impugned. But it is argued here that this rule must give way to the clause in the Registry Act, "and tacking shall not be allowed in any case to prevail against the provisions of this Act." The first answer to this position is, that the uniting of two mortgages in one hand against the same mortgagor is not "tacking." The word "tacking" had at the time of the passing of these Acts, 29 Vic., ch. 24, and 13 & 14 Vic., ch. 63,—consolidated by ch. 87 of the Con. Stat. of U. C.,—a well defined meaning, and was not then, as it cannot be now, correctly applied to a claim such as that made by the plaintiffs in respect of the two mortgages in question. But even if, for the sake of argument, it were admitted that the term

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"tacking" is applicable to the present, it is not every case in which it is abolished. It is not "allowed in any case to prevail against the provisions of this Act." The Act makes registration notice—that is constituted the test, and here both mortgages being registered, and the defendant *Kittridge* dealing with both of the lots had that notice which this Act intended he should have. It is not therefore easy to see what provisions of the Act are violated when the prior mortgagee asks that the person subsequently dealing with the premises shall be held bound by the information found at the Registry office. It is immaterial whether or not he actually searched, as it has been held that registration constitutes notice to persons dealing as here subsequently with the lot, whether as a fact they actually went to the office or not. I think the defendant *Kittridge* took his mortgage with notice through the Registry office of all those circumstances which give the plaintiffs the right now claimed, and that on the first ground taken, it cannot be defeated.

Judgment.

It is said, however, that whatever might otherwise have been the position of the plaintiffs, it was lost by the act of the secretary when *Kittridge* was dealing with the premises.

Kittridge before the day he accepted his mortgage telegraphed the plaintiffs' secretary as follows: "27th January, 1874. Is mortgage *Loughead & Hendrie* discharged. How much is yours?" which was answered by the company: "*Hendrie's* mortgage discharged. Six hundred and fifty-two dollars will pay off our mortgage." As the applicant did not state the reason he desired the information which he sought from the company, I do not think on the principle laid down in *Moffat* v. *Bank of Upper Canada* (*a*), that the plaintiffs are bound by the answer made. There is no doubt, how-

(*a*) 5 Gr. 374.

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ever, that from the first *Kittridge* thought the company only claimed the one mortgage against this lot, and it is equally clear that the company did not then intend to insist on any other position. *Kittridge* closed the transaction with *Loughead*; and again on the 20th January, 1875, wrote the plaintiffs as follows; "Please let me know the amount of your mortgage from *J. S. Loughhead* on lot No. 29, *Johnson & Winlow's* survey here. How is it made up, &c., as I would like to take it up." In answer to this communication which informed the mortgagees that the applicant was going to deal with the premises, and, therefore, that the reply would bind the company, the secretary sent the following memorandum: "$741 will pay off *James S. Loughead's* loan on lot No. 29, on the south side of Albert street, Strathroy, if paid before 1st of February, 1875." It is true that this offer was a conditional one, but it is equally true that in place of charging this lot with both the mortgages, the company answer that the loan as to this lot is only as to the one mortgage, the amount of which they specify. Nothing further was done in the matter until shortly before the 16th of the following month of March, when a demand having been made by the company against *Loughead* in respect of the mortgage due on lot No. 29, *Kittridge* on the last mentioned date writes at follows to the secretary of the company, and encloses to them a check for $193.70.

Judgment.

"STRATHROY, 16th March, 1875.

"DEAR SIR,—I have your letter to *James S. Loughead* claiming $193.70 to pay instalment, interest, and costs on his mortgage on lot No. 29, in *Johnson & Winlow's* survey to the present time, which you say includes costs on the other mortgage. I enclose my cheque for $193.70, but claim that I should not be required to pay costs on both mortgages as I was never served with any notice. I wish to pay your mortgage as it becomes due on this property, or pay it up and take assignment at

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some future time if necessary, as I hold the second mortgage on it and make this payment on that condition.

Yours truly,

A. H. KITTRIDGE.

To F. B. LEYS, ESQ., Secretary & Treasurer, Dominion Savings and Investment Society, London."

So far from repudiating the position then taken by *Kittridge*, the company with a full knowledge of his position and what he desired to accomplish, accept this money and thus acknowledge its receipt: "I have your letter enclosing check for $193.70, first instalment, interest, and costs, on *James S. Loughead's* first loan At the request of Mr. *Loughead* the total costs up to the present was included." Subsequently to this and in August, 1875, *Kittridge* obtained from *Loughead* a release of his equity of redemption on lot No. 29. In the December following the company demanded the amount due on both mortgages and refused to treat with *Kittridge*, except on the footing of his liability for the two, in order to obtain a release of lot No. 29.

Judgment.

I think as the plaintiffs accepted the $193.70, on the terms specified in *Kittridge's* letter, and allowed him on the faith of the arrangement to deal with *Loughead*, and to take from him a release of lot No. 29, the company cannot repudiate the condition on which the money was paid, and that they must now discharge lot No. 29 on payment by *Kittridge* of the amount due on the mortgage given upon this lot. Had the company at an earlier date in place of acceding to the proposition of *Kittridge* refused it, he might have been able otherwise to have arranged with *Loughead* for satisfaction of his claim. The company cannot now set up this equity which they had to the injury of one who has dealt with them on a representation, equivalent to a statement that this equity would not be enforced. The company must

1876. pay the costs of *Kittridge* up to the hearing, as the point now decided against the plaintiffs was the only one raised. There will be, in other respects, the usual decree for sale in mortgage cases.

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The holders of several promissory notes applied to the plaintiff to indorse the same for his accommodation, which he did on the promise of the holder to execute a mortgage on certain lands to one *L.*, to whom he was indebted in $1,200 on account of the purchase money of these lands, securing the payment thereof, as also of the notes. The consideration expressed in the mortgage was $1,200 only, but the proviso for redemption embraced the notes as well as the $1,200. *L.* also indorsed the notes, and on maturity retired them, and the plaintiff having paid *L.* the amount of the notes, obtained from him an assignment of the mortgage:

Held, (1) that the transactions rendered *L.* and the plaintiff in effect co-sureties, and that the plaintiff was entitled to the benefit of the security held by *L.* by way of indemnity; and (2) that the plaintiff was entitled to enforce the mortgage against a purchaser who took his conveyance after searching the registry office and upon the assurance that the mortgage was made to secure $1,200 only.

Menzies v. *Kennedy*, 360.

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ACCRETIONS TO LANDS.

The accretions of soil to the lands of a private individual by action of the elements belong to the owner, and in the same way accretions to a public highway are taken to be and form part of such highway.

Standly v. *Perry*, 507.

ADMINISTRATION.

1. The mere fact that one brother performs for several years work for another, will not raise the presumption of a promise to pay. Where, therefore, the evidence before the Master was, that the claimant had worked in the mill of the testator (his brother) from the year 1861 till 1874, without any express agreement for wages, but the testator had promised *to be faithful* to the claimant, the Master refused to admit the claim, and this ruling was, on appeal, affirmed by the Court.

Re Ritchie, Sewery v. *Ritchie*, 66.

2. Where in an administration suit an alleged creditor was examined before the Master, but failed to establish his demand, the Court on affirming the Master's finding refused a reference back in order to afford the party an opportunity of calling other evidence to establish his demand. *Ib.*

3. *J. S. C.* died in the State of New York, leaving a will, which the Courts there declared void as having been improperly attested, and thereupon letters of administration of his effects in Ontario were granted to his widow, by the proper Court; and she and the next of kin—all of whom were of age—made an agreement for the distribution of all the assets, whereupon she filed a bill in this Court to have such agreement established and the intended will declared invalid, with a view of estopping the intended legatees thereunder from afterwards attempting to set up the same. The Court under the circumstances and in view that the intended legatees were not parties, and that no controversy was shewn to exist, refused to make any declaration, and dismissed the bill; but—as the defendants were all assenting parties to the course pursued by the plaintiff—without costs.

Clarke v. *Cooke*, 110.

ADMINISTRATION OF JUSTICE ACT.

1. Where, by fraud and collusion a judgment has been recovered at law to protect the property of the judgment debtor, and a creditor takes proceedings at law for the recovery of his demand, he is precluded from applying to this Court for relief, as the Court of law has power to work out all the rights and remedies necessary to do complete justice.

Knox v. *Travers*, 41.

2. Each party to a suit is bound, under the Administration of Justice Act (1873), to apply to the Court first approached for the full measure of relief and protection to which he may consider himself entitled. Where, therefore, an action of ejectment

was brought and the defendant limited his defence to a portion of the premises only, after which he commenced trespassing on the remaining portion, and the plaintiff thereupon applied to this Court for an injunction to restrain such acts, the Court, acting upon the principle above stated, refused the application.

French v. *Taylor*, 436.

3. Under the Statute 28 Vic., ch. 17, sec. 3, and the Administration of Justice Act (1873), this Court is bound, where damages are shewn to have been sustained by a plaintiff to give him full relief in any suit brought before it, by directing an inquiry as to the damages sustained; and the Court is not at liberty to send the plaintiff to law for the purpose of obtaining such damages.

Standly v. *Perry*, 507.

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1. This Court will, on appeals from the Judge's ruling in insolvency—as on appeals from other Courts—in cases where the evidence is contradictory, be governed in a great measure by the opinion of the Judge who has seen the witnesses give their testimony; yet where giving full credence to all the witnesses relied on by the Judge this Court differed in opinion from him as to the effect of that evidence, this Court reversed the finding of the Judge.

Re H. J. Weeks, an Insolvent, 252.

2. In proceedings before the County Court Judge, a claim was put in by the mother of the insolvent, which the creditors

opposed the allowance of, on the ground that the mother was indebted to the son in a greater amount than her claim—such claim being distinctly proved by the claimant, her husband and the insolvent. The Judge allowed the claim, from which allowance the inspectors of the estate appealed, and then sought to impeach the claim of the mother altogether as being fraudulent—the only objection suggested in opposition to the evidence stated, being the fact that the money said to have been deposited in the bank by the claimant was in gold (sovereigns), which the Court was asked to assume was so improbable and incredible as to be evidence of fraud. The Court, however—on the ground that the Judge who saw the parties give their evidence had thought the proof of the *bona fides* of the debt sufficiently established and had allowed the claim—agreed in the conclusion at which the Judge had arrived, and dismissed the appeal with costs. *Ib.*

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The Statute 20 Vic., ch. 3, sec. 11, (C. S. U. C. ch. 45, sec. 3), authorizes the sale by the sheriff of any goods and chattels under mortgage, the effect of such sale being to convey whatever interest the mortgagor had therein.

Held, (1) that this authorized the sale under execution of a lessee's interest in land although subject to two mortgages which were held by different parties, and although the lessee had previously parted with a portion of the property so leased; and (2) that this also authorized the sheriff to sell the interest of a debtor in stock in a warehousing company, althongh the same stood in the names of other persons, as to one part to secure a sum of money, and as to other part to secure the due performance of an agreement.

Ross v. *Simpson*, 552.

CHILDREN, LIFE ESTATES TO.

See "Will," &c., 9.

CHURCH, BILL BY TRUSTEES OF.

Where a bill was filed in the name of "The Trustees of the Franklin Congregation of the Methodist Church of Canada" against persons claiming under a deed from the grantor, for the purpose of setting aside such deed as a cloud upon the title of the plaintiffs:

Held, that the suit was properly instituted by the trustees as such; and that neither their grantor nor *The Attorney-General* was a necessary party thereto: and, *Semble*, that the effect of the Statute was to constitute the trustees a corporation; but at all events they had a right to sue in their collective name in the same manner as a coporate body would sue.

The Trustees of the Franklin Church v. *Maguire*, 102.

CHURCH TEMPORALITIES ACT.

1. This Court has jurisdiction to entertain a bill for the purpose of setting aside the improper election of a churchwarden,

and for that purpose to carry on a scrutiny of votes. A party so complaining is not compelled to resort to proceedings by mandamus, the remedy in this Court being speedy, and there being nothing in the machinery or practice to prevent the decision being equally accurate.

Tully v. *Farrell*, 49.

2. The absolute purchase of a pew in a church creates in the purchaser a fee simple, which is not subject to forfeiture by reason of a change of residence of the purchaser, or his ceasing to frequent such pew ; and he may bargain, sell, or assign his interest to another, being a member of the Church of England ; or the pew may be apportioned into sittings amongst several grantees or assignees, either for value or without consideration, each of whom will have a voice in the election of churchwarden ; so also the owner of a pew may devise the same, and in the event of intestacy his interest therein will, like his other freeholds, descend to his heir at law. *Ib.*

3. Under the Church Temporalities Act (3 Vic., ch. 74, sec. 2), all persons of either sex holding pews, whether as owners or lessees thereof, or holding sittings therein under certificates or other memoranda from the churchwardens, are entitled to vote at vestry meetings held for the election of churchwardens. *Ib.*

4. Where a person claims to be entitled to vote as holder of a sitting in a pew, the voter must if required so to do, produce a certificate shewing that the voter holds by leave of the churchwardens ; but no particular form of certificate is necessary ; a receipt for the rent of such sitting is sufficient. This, however, is not necessaey, in the case of a lease of a pew ; there a verbal lease suffices. *Ib.*

5. In a proceeding to set aside the election of a churchwarden, *held*, that it was too late. at the hearing, for the defendant to object that the bill should have been on behalf of the plaintiff and such of the members of the vestry as voted for him only ; not on behalf of all the members thereof. *Ib.*

6. On the 29th of March, the day of the election of a churchwarden, application was made to rent a pew for three months from the 1st of April following, and the application was granted. *Held*, that this did not confer a right on the applicant to vote at such election. *Ib.*

7. Where the absolute owners of pews authorize the churchwardens to lease the same or rent sittings therein, the lessees or occupiers are entitled to vote for churchwarden. *Ib.*

8. Where on an election of churchwarden several votes of women were taken in favour of the defendant; and the plaintiff, the unsuccessful candidate, filed a bill to set aside the election on this, amongst other grounds, the Court though it dismissed the bill, refused to make any order as to costs ; the unusual course adopted of females voting having invited inquiry, and the Court being of opinion that, under the circumstances, the defendant ought to maintain the right to vote at his own expense. *Ib.*

CHURCHWARDENS, ELECTION OF

See "Church Temporalities Act."

COLOURABLE DEVIATIONS.

See "Patent of Invention," 4.

COMPENSATION FOR LANDS TAKEN BY RAILWAY.

See "Railway Company," 3.

COMPENSATION TO ADMINISTRATRIX.

Letters of administration having been granted to the widow of an intestate, she, without any formal appointment as such, acted as guardian of their infant children, and received the rents and profits of the real estate, all of which she duly accounted for. The Master in taking the accounts allowed her a compensation on the receipt and application of such rents and profits, as well as the personal estate, amounting in all to $133. On further directions the Court, regarding the case as an exceptional one, refused to interfere with such allowance.

Doan v. *Davis*, 207.

COMPROMISE.

See "Executors."
"Fire Insurance," 8.

CONFLICTING EVIDENCE.

See "Insurance," 1.

CONSOLIDATING MORTGAGES.

See "Mortgage," &c., 11, 12, 13.

COPYRIGHT.

1. It is not necessary for the author of a book who has duly copyrighted the work in England, to copyright it in Canada, with a view of restraining a reprint of it there; but if he desires to prevent the importation into Canada of pirated copies from a foreign country, he must copyright the book in Canada.

Smiles v. *Belford*, 590.

2. Before the author of an English copyright book is in a position to take any proceeding for the protection, or to prevent the infringement of the copyright, he must register his book under the 24th section of the Imperial Statute, 5 & 6 Vic., ch. 45. *Ib.*

CORPORATE CHARACTER.

See "Church," &c.

CORROBORATIVE EVIDENCE.

See "Executors," 1.

COSTS.

1. Where the widow of a settlor, who had a claim for dower, had obtained possession of the trust estate, the costs of an action of ejectment to recover possession were allowed out of the estate.

The Edinburgh Life Assurance Co. v. *Allen*, 230.

2. Where the several members of classes of persons interested in an estate severed in instructing counsel, the Court though it gave them the costs out of the estate, directed the attention of the Master to the subject on taxation.

Crawford v. *Lundy*, 244.

3. Mortgagees having insisted on their right to consolidate two mortgages as against a purchaser of the equity of redemption in one of the properties, which claim was decided against them, were ordered to pay the costs up to the hearing, that being the only point raised thereat.

Dominion Savings and Investment Society v. *Kittridge*, 631.

See also "Church Temporalities Act," 8.
"Dower," 2, 3.
"Fire Insurance," 7, 9.
"Illegal By-law."
"Solicitor and Client," 1, 2.
"Undue Influence."

CO-SURETIES.

See " Accommodation Indorsers."

COUNTY COURTS.

The Administration of Justice Act (1873, O.) applies to proceedings in County Courts as well as to those in the Superior Courts of the Province. Where, therefore, the Judge of the County Court of Wentworth had in garnishee proceedings made several orders for payment out of moneys admitted to be in the hands of an insurance company, and subsequently the Judge of the County Court of Essex, in opposition to the contention of the company, made a similar order at the instance of another creditor, which had the effect of rendering the company liable to pay a sum greatly exceeding the amount found due to the original debtor, and the company filed a bill calling upon the several claimants to interplead, the Court refused to make such an order, on the gronnd that the rights of all parties might have been adjusted in the suit in the County of Essex, and if dissatisfied with the decision there the company might have appealed from it.

The Victoria Mutual Fire Insurance Company v. *Bethune*, 568.

DAMAGES.

See " Administration of Justice Act," 3.

DEFECT IN TITLE.

[NOTICE OF.]

See " Vendor and Purchaser," 1, 3.

DELIVERY OF RAILWAY IRON.

See " Railway Company," 1.

DEMURRER.

1. Where a bill was filed by an execution creditor to impeach a conveyance by the debtor, and it did not appear that the action at law had been commenced after the passing of the Administration of Justice Act, a demurrer on the ground that the plaintiff ought to have obtained relief in the suit at law was overruled.

Sawyer v. *Linton*, 43.

2. A bill was filed by a shareholder in a railway company complaining of the misconduct of the managing director against the managing director and the company, on behalf of the plaintiff and all other shareholders not made defendants; to which the defendants demurred on the ground, amongst others, that the bill should have been by the company, which on argument was allowed with liberty to amend; and, thereupon, the plaintiff amended by charging that the managing director and the other directors held proxies sufficient to control, and did control the corporation, and had caused the company to adopt and confirm the illegal acts of the managing director; and that, controlling as they did the meetings of the bondholders and shareholders, it would be idle and useless to have a general or special general meeting of the bondholders and shareholders called for the purpose of obtaining a direction from them to the directors, to file a bill against the managing director to bring him to an account. The defendants demurred for want of equity, which was allowed; but without costs, as the defendants had raised grounds of demurrer, which had been overruled on the argument of the demurrer to the original bill.

McMurray v. *The Northern Railway Company*, 134.

3. The proper manner of framing a bill in such a case considered and stated. *Ib.*

See also "Administration of Justice Act," 1.
"Church," &c.
"Mortgage," &c., 9.
"Pleading," 2.

DEVISE SUBJECT TO A CHARGE.

1. Where a suit is brought to enforce the payment of an annuity issuing out of several parcels of lands it is not necessary that all the persons interested in these lands should be made parties; but where this was not done the Court directed the decree to give the defendants liberty to proceed by petition to add the persons whom they might consider liable to contribute to the claim of the annuitant; it being more reasonable that the questions involved should be litigated at the expense of the defendants than at the expense of the annuitant.

Miller v. *Vickers*, 218.

2. The rule applicable to mortgage cases where the legal estate is in the hands of several parties does not apply, as there the party seeking to redeem is entitled to a re-conveyance of the whole estate, and in that view the whole estate must be represented. *Ib.*

DISCONTINUING NUISANCE.

See "Nuisance," 1.

DISCRETION IN INVESTING.

See "Trusts," &c., 1.
"Will," 1, 2.

DISMISSAL FOR CAUSE.

See "Master and Servant."

DISTRIBUTION.

See "Administration," 3.

DOWER.

1. Where a woman joins with her husband in creating a mortgage to bar her dower for securing a debt of the husband, and after his death the lands are sold during the widow's lifetime, she is entitled to dower out of the whole value of the mortgaged premises, and not only out of their value beyond the mortgage debt.

Doan v. *Davis*, 207.

2. Where in a suit for partition, a sale is ordered of an estate, subject to a mortgage, securing a debt of the ancestor, and in which his wife had joined to bar dower, the Master, before estimating the dower of the widow, should not deduct the costs of the suit; the widow's right in such a case being to have her dower out of the gross value of the estate.

Lindsay v. *Lindsay*, 210.

3. The interest of the purchase money of the estate so sold commenced to run on the 31st of March, 1875, and the report of the Master bore date the 3rd of February, 1876. An appeal on the ground that the Master should have computed interest on the sum allowed for dower from the former date was dismissed with costs; the Court assuming that the value of the dower was ascertained at the date of the report. *Ib.*

ELECTION OF CHURCH WARDEN.

See "Church Temporalities Act."

EVIDENCE.

See "Personal Representative."

EVIDENCE ACT.

See "Executors."

EVIDENCE OF CLAIM.

See "Appeal from County Judge," 2.

EXECUTORS.

Where a claim is made against the estate of a testator, and the executors in the *bona fide* discharge of their duty compromise the claim, it is not necessary on passing the accounts of the executors that any corroborative evidence should be adduced.

Re Robbins, 162.

See also "Mortgage," &c., 8.

FAILING IN SOME DEFENCES.

See "Fire Insurance," 7.

FAMILY ARRANGEMENTS.

See "Will," &c., 6.

FIRE INSURANCE.

1. The plaintiff applied to the agent of the defendants to effect an insurance on certain buildings. The agent accepted the risk, and gave to the plaintiff the usual interim receipt, which stated "the said party and property to be considered insured until otherwise notified, either by notice mailed from the head office, or by me, to the insurer's address within one month from the date hereof, when, if declined, the receipt shall become void and be surrendered. N.B.—Should applicant not receive a policy in conformity with his application within twenty days from the date hereof, he must communicate with the Secretary direct, as after one month from this date the receipt becomes void." The agent omitted to transmit the application to the company, and the plaintiff, not having been notified, applied personally to the agent, who stated such an occurrence was not unfrequent, and by

way of satisfying the plaintiff, granted a fresh interim receipt, repeating this on four several occasions :

Held, (1) that such renewed interim receipts were valueless, there being, in fact, no new insurance effected; (2) that the neglect of the agent to do his duty by forwarding the application to the company, could not operate to the prejudice of the plaintiff; and (3) that the mere lapse of a month without any notice to the assured did not render the receipt void; but the stipulation gave the company a month during which to consider the application, and enabled them to terminate the risk within that period: but in such a case, if the company does not intimate an intention of terminating the risk, then there is a contract for insurance for the year binding on the company, on the same terms and conditions as the ordinary policies of the company.

Hawke v. *Niagara District Mutual Fire Insurance Company*, 139.

2. By a by-law (No. 16) of the company it was declared that certain circumstances would vitiate the policy unless notice were given, the consent of the board obtained and indorsed on the policy, and signed by the President and Secretary.

Held, that the word *policy* here meant *insurance* or some equivalent, and that the plaintiff, holding such interim receipt, was not exonerated from giving the notice required, as the consent might be indorsed on the receipt. *Ib.*

3. One of the circumstances which the by-law (16) declared would vitiate the policy, unless notified in writing to the Secretary, consented to by the board, and indorsed, was that "of alienating by mortgage or otherwise, or any change in the title or ownership of the property insured." A few days after obtaining the first interim receipt, the plaintiff mortgaged the property, which he notified verbally to the agent, who was otherwise well aware of the transaction, but no notice in writing was given to the Secretary.

Held, that such want of notice in writing to the Secretary vitiated the policy; but *quære* what the conclusion should be if notice, though not in writing, were traced home to the company. *Ib.*

4. By the rules of an insurance company no insurance on houses would be effected for more than two-thirds the value of the premises exclusive of the value of the land. The owner of houses applied for insurance to the extent of $5,850, having previously effected an insurance in another company to the extent of $5,000, and the copy of his application produced at the hearing shewed the value to be $8,500. This the claimant swore, *if* a true copy, was an incorrect statement of the value, as

the actual cost of the building insured was upwards of $15,000.

Held, that as this was not an over-valuation to the prejudice of the company, the plaintiff should be allowed, in a suit to enforce payment of the insurance money, to shew the true value.

Hawke v. *Niagara District Mutual Fire Insurance Co.*, 139.

5. One of the by-laws of an insurance company provided that a detailed account of any loss verified by oath was to be given to the company within thirty days after the loss sustained ; and in case of any mis-representation, fraud, or false swearing, the assured should forfeit all claim by virtue of his policy ; and the Act of the Legislature (36 Vic., ch. 44, O.,) also required such proof to be given within thirty days after the loss sustained. The assured considering it unnecessary to do so, did not give the proof until after the thirty days had elapsed :

Held, that under such circumstances the claimant could not recover the amount of his loss : but *semble*, if the proofs had not been furnished by reason of accident or mistake, relief might have been afforded him. *Ib.*

6. Where a risk has once begun to run and is subsequently avoided by some neglect or default of the assured, there cannot be a return ordered of any portion of the premium. *Ib.*

7. Where an insurance company set up several defences, some of which they failed to substantiate, the Court on dismissing the bill did so without costs. *Ib.*

8. Where an insurance company chooses, rather than litigate the question of their liability to the assured, to compromise his claim, they cannot afterwards impeach the settlement, although they may be able to shew they have been imposed upon ; and where the money paid upon such a compromise had been, by the agent who effected the arrangement with the company, paid over to a bank to whom the claim had been assigned, who thereupon gave up certain notes held by the bank, the Court refused to open up the settlement which had been made, although the evidence distinctly shewed that a gross fraud had been perpetrated upon the company : that the fire by which the alleged loss was said to have been sustained, was caused by the parties concerned, and that in fact the goods, the loss of which was claimed for, never were destroyed.

British America Assurance Co. v. *Wilkinson*, 151.

9. Where, in obtaining the settlement of a pretended claim against an insurance company, the agent employed to effect the arrangement had been guilty of very improper conduct, which, however, had not had the effect of producing the compromise, the

Court, although compelled to dismiss the bill, refused him his costs of a suit brought to set aside the settlement, and to which such agent had been made a defendant. *Ib.*

10. In transactions relative to fire insurance the utmost good faith should be observed on both sides. Parties who had obtained an interim receipt for insurance on their stock of goods in a building "S. T. No. 272," next day notified the agent of the insurance company that they had added to their former premises two flats of the adjoining building, and had cut doors in the division wall leading into such flats and in which they had then placed part of their goods. The agent thereupon visited and inspected the premises, when he informed the parties that the rate of insurance would have to be increased, to which they assented, stating their stock must be insured "under any circumstances." The parties paid the increased premium and obtained from the agent a receipt for the premium on an insurance "on their stock * * contained in a building * * on the south side of King street," and a policy in professed pursuance thereof was subsequently sent from the head office of the company (in Canada) in Montreal, on which a memorandum in pencil was written by the resident chief agent of the company: "N.B.—There is an opening in the east end gable of the above through which communication is had with the adjoining house," and which such agent swore was made by him "for the express purpose of making it perfectly distinct and confining the risk to the house there mentioned * * I framed the policy so as to cover only the stock in the one building. I wanted to make this sure * * thinking that the plaintiffs might, perhaps, think the goods in both buildings were being covered," but he never gave any intimation of such intention either to the assured or to the local agent.

Held, (1) affirming the decree of the Court below, that under the circumstances the assured were entitled to recover for damage by fire done to the goods in both buildings, and that, if necessary to do so, the policy would be reformed in this respect; (2) that the interim receipt was intended to cover and did cover the goods in both premises, and the policy subsequently issued was not in accordance therewith; the right of action on the receipt remained, and the assured were entitled to recover for a loss sustained in respect of the goods contained in such added flats.

Wyld v. *The Liverpool and London and Globe Fire Insurance Co.* [*In Appeal.*] 442.

See also "Insurance."

FRAME OF BILL.

See "Demurrer," 3.

FRAUD.

See "Fire Insurance," 9.
"Railway Stock."

FRAUD ON CREDITORS.

See "Fraudulent Conveyance," 2.

FRAUDULENT ASSIGNMENT.

A widow, by writing duly signed, sealed, and attested, released to her son *W.* a sum of $14,477.95, "standing to my account in my son *William's* books at this date, and which I intended to give him; I hereby give it to him and release him from all claim in respect thereof." *W.* subsequently went into a somewhat hazardous business, and afterwards becoming insolvent made an assignment under the Insolvent Acts. In a suit instituted by the Official Assignee claiming this money for *W's* creditors, the Court allowed parol evidence to be given, shewing that such release, though absolute in form, was, as to one-half of the amount transferred, intended to create a trust in favor of another son, *A.*, his wife and children; and the Court being satisfied of the truthfulness of such evidence, refused the relief asked, and dismissed the bill with costs.

Kerr v. *Read*, 525.

FRAUDULENT CONVEYANCE.

1. In a suit impeaching a conveyance on the ground of fraud, the bill stated that the grantor for a "professed" valuable consideration conveyed the land; and that the conveyance "was made with intent on the part of the said defendant to defeat, delay and defraud the said plaintiff," and the other creditors.

Held, that this sufficiently stated a want of consideration for the conveyance, and that the object was to defeat, hinder, and delay, creditors within the meaning of the statute, 13 Eliz., ch. 5.

Sawyer v. *Linton*, 43.

2. A trader in insolvent circumstances, for the purpose, avowedly, of inducing his wife to release her dower in a property shewn to have been worth about $1,300, conveyed to her a farm, the net value of which was about $1,700.

Held, that this was a fraud upon creditors: and the Court set aside the transaction with costs.

Black v. *Fountain*, 174.

FRAUDULENT JUDGMENT.

See "Administration of Justice Act," 1.

FURTHER EVIDENCE.

See "Administration," 2.

GIFT, INTER VIVOS.

Before 1859 a husband received a sum of money bequeathed to his wife, upon receipt of which he made an entry in an account book indicating what the money was and the source from which he had received it; he mixed this money with his own, using it in the erection of buildings upon land seemingly his own, but treating the money as money to the usufruct of which his wife was entitled. In 1853 one of his sons, *W.*, was indebted to him in an amount about equal to such legacy, and with a view of accounting to her for such legacy, and with her assent, he made entries in his books transferring such indebtedness of *W.* to his wife:

Held, that the transfer of the son's debt was a good gift *inter vivos* from the husband to his wife.

Kerr v. *Read*, 525.

GUARDIAN OF INFANTS.

1. The father of infants died intestate, and his widow obtained letters of administration, who by her will appointed her sister, a married woman, sole guardian of her two infant daughters. After her death the paternal grandfather of the infants applied to the Judge of the Surrogate Court to be appointed their guardian, who, in opposition to objections made by the sister did appoint him their guardian:

Held, on appeal, (1) that although this Court has jurisdiction to appoint guardians to infants notwithstanding the enactment of the Surrogate Act (22 Vic. ch. 93) it will not do so on an appeal like this: (2) that the fact of the person named as guardian in the will of the deceased mother of the children being a married woman was itself sufficient to prevent the Court appointing her.

Re McQueen, *McQueen* v. *McMillan*, 191.

2. It is not the practice of the Court to give weight to the objection that a person sought to be appointed guardian to an infant is the next of kin to whom the lands of the infant would descend. *Ib.*

3. The guardian of infants cannot give a lease of their estate ; such lease is void *ab initio*, unless the sanction of the Court has been obtained thereto.

Switzer v. *McMillan*, 538,

HEIR-AT-LAW.

See "Personal Representative."

HIGHWAY.

See "Accretions to Lands."
"Rights of Public."

HUSBAND AND WIFE.

See "Fraudulent Conveyance," 2.
"Gift *inter vivos*."

ILLEGAL BY-LAW.

See "Municipal Councillors."

ILLEGAL DISPOSITION OF LANDS.

See "Railway Company," 3.

IMPROVEMENTS.

See "Mortgage," &c., 3, 4.

IMPROVIDENT BARGAIN.

See "Undue Influence."

INFANTS' ESTATES.

The Court will not countenance the unnecessary incurring of costs of filing a bill for the partition and sale of the estate of infants for the purpose of discharging a mortgage thereon, which object could be obtained as effectually in the ordinary way by proceedings being taken at the instance of the mortgagee ; and where such a suit was brought in the name of infants, the Court on dismissing the bill ordered the costs of the defendants to be paid by the next friend of the infants.

Carroll v. *Carroll*, 438.

INJUNCTION.

See "Administration of Justice Act," 2.
"Copyright."
"Nuisance," 1, 2.
"Parties," 1.
"Presbyterian Church in Canada," 3.

INSOLVENCY.

In proceedings in insolvency mortgagees claimed to rank upon the insolvent estate for the excess of their claim over the value placed by them upon the mortgage premises, after which they discovered that certain property intended to be included in the security had, by mutual mistake, been omitted therefrom, whereupon they filed a bill in this Court to have the mortgage rectified and the security realized.

Held, that the fact of the mortgagees having so proceeded in insolvency, formed no objection to the relief asked, and the Court ordered a rectification of the instrument as prayed; as this was relief *dehors* the administration of the assets in which the Judge in Insolvency could not give adequate relief, remitting the parties back to the Insolvency proceedings with a view of the same, or a new value being placed by the mortgagees on their security, in order that the assignee and creditors might proceed under the statute; and in the event of those proceedings resulting in the security being retained by the mortgagees, the Court directed the bill to be retained to enable them to resume proceedings here to realize the security, for which purpose it would be necessary simply to file a petition stating shortly the proceedings taken and their result.

Cameron v. *Kerr*, 374.

See also "Appeal from County Judge," 1, 2.

INSOLVENT ESTATES.

See "Trusts," &c., 6.

INSURANCE.

The decree pronounced *ante* volume xxi., page 578, affirmed on appeal, the Court being of opinion that the evidence warranted the decree which has been made, and shewed that the effect of all that had passed between the parties was to establish the payment of the amount of the renewal premium.

Staunton v. *The Western Assurance Co.*, 81.

INTEREST.

See "Substantial Interest."

INTEREST.

[TIME FOR PAYMENT OF.]

See "Mortgage," &c., 2.

INTERIM RECEIPT.

See "Fire Insurance," 1–2.

INTERPLEADER SUIT.

The plaintiffs having in their hands a sum of money, the proceeds of certain goods sold by them as auctioneers at the instance of one *W.*, but which was claimed by *B.*, the official assignee of one *H.* an insolvent, were ordered by the Judge in insolvency to pay the amount to *B.*, which they did, and notified the attorneys of *W.* of the fact, who thereupon proceeded with an action at law which he had previously instituted against the plaintiffs to recover this money. The plaintiffs thereupon claiming to be stakeholders only, filed a bill of interpleader against *W.* and *B.*

Held (1) that the plaintiffs, having already paid over the money to one of the claimants, were not in a position to call upon *W.* and *B.* to interplead; (2) that the plaintiffs' obvious duty, upon being sued at law, was to have pleaded the facts and applied to that Court, who would in a proper case have made an order allowing the money to be brought into Court, adding *B.* as a party to that suit, and discharging the plaintiffs here from further attendance therein, and directing *B.* and *W.* to test their respective claims to the fund so brought into Court; there being no reason why such proceedings should be an exception to that which had been laid down as the general rule introduced by the Administration of Justice Act, that wherever proceedings are commenced, there complete relief between the parties is to be worked out.

Henderson v. *Watson*, 355.

See also "County Courts."

INVESTING TRUST FUNDS IN REAL ESTATE.

See "Trusts," &c., 1.

IRREGULAR VOTING.

See "Presbyterian Church in Canada," 1, 2, 3.

LEASE.

See "Guardian of Infants," 3.
"Chattels," &c.

LEGACIES.

[SPECIFIC OR DEMONSTRATIVE AND ABATEMENT OF.]

See "Will," &c., 4.

LEGACY TO WIFE.

See "Gift *inter vivos*."

LIFE ESTATES TO CHILDREN.

See "Will," &c., 9.

LOST NOTES.

[SECURITY AGAINST.]

Where in a suit to enforce payment of promissory notes that had been lost, after maturity, the defendant allowed the bill to be taken *pro confesso*, and omitted to make any demand for security against the notes, the Court made a decree for payment without requiring the plaintiff to give such security.

Abell v. *Morrison*, 109.

LOTTERY.

See "Railway Company," 3.

MANDAMUS.

See "Church Temporalities Act," 1.

MASTER AND SERVANT.

Where a person in the service of another under a yearly hiring is dismissed for cause by his employer during the currency of any one year, he is not entitled to any remuneration for the portion of the year he has served; but if he has been paid any portion of such year's salary the employer is not entitled to recover it back, neither is he entitled to have it applied on account of moneys payable in respect of a previous year's service;

and although the employer on dismissing his employee may have assigned one ground therefor, he is not precluded from afterwards shewing the entire ground for such dismissal.

Tibbs v. *Wilkes*, 439.

MECHANICAL EQUIVALENT.

See "Patent of Invention," 4.

MECHANICS' LIEN ACT.

G. & *M.* agreed with the defendant *B.* to furnish and put up in his building certain machinery, to be paid for partly by assigning a mortgage for $1066 held by *B.*, and the residue of the price to be secured by a mortgage to be executed by *B.*, no time being mentioned for which credit was to be given. On the 8th of June, 1875, *B.* discharged *G.* & *M.'s* workman from further work in putting up the machinery, and the balance thereof was left in the building. On the 2nd of July, 1875, *G.* & *M.* registered the usual mechanics' lien for $1030, balance of the price of the machinery so put up, and $38.45 for labour, and on the 7th of the same month filed a bill to enforce their lien, which on the 19th of January following, on motion of the defendant, was dismissed for want of service, but without prejudice to the lien (if any) of *G.* & *M.* On the 15th of July preceding the present suit was commenced, and on the 19th of January a decree was made declaring the plaintiffs entitled to a lien and directing the usual accounts to be taken.

Held, that as against *B.*, *G.* & *M.* were entitled to prove for the amount of their claim; and as the plaintiffs did not appeal from the allowance thereof by the Master the Court dismissed an appeal therefrom by the assignee of *B.* with costs.

Bunting v. *Bell*, 548.

MEETING CALLED IRREGULARLY.

See "Presbyterian Church in Canada," 1.

MISTAKE.

See "Insolvency."

MIXED FUND.

See "Will," &c., 8.

MORTGAGE, MORTGAGEE, AND MORTGAGOR.

1. The rights of mortgagor and mortgagee are reciprocal, in so far as the right to redeem being shewn the right to foreclose is thereby established; although the identical conditions attached to the one right may not be attached to the other.

Parker v. *The Vinegrowers' Association*, 179.

2. By the terms of the proviso for redemption in a mortgage, the principal money was to remain unpaid so long as the interest reserved was paid at the days and times specified therefor; but, in default of payment of the interest for a period of six months, then the whole of the principal money should become due and payable:

Held, that a bill to foreclose would not lie for any default in payment of interest for a shorter time than six months, although, as it fell due, the interest could be collected: and, *quære*, whether in such a case the mortgagor would have the right to pay the principal money against the will of the mortgagee, by giving six months' notice, or paying six months' interest in advance; or whether he could take advantage of his own default in non-payment of interest for six months. and claim *that* as the condition on which he was at liberty to redeem. But *semble* he is bound to wait until the mortgagee insists on the default as giving him a right to foreclose before the right to redeem arises in favour of the mortgagor. *Ib.*

3. Mortgagors released their equity of redemption to the mortgagee, who about two months afterwards signed a memorandum agreeing to reconvey upon being paid principal and interest and all costs of improvemente made by her.

Held, on a bill to redeem, that the mortgagee was entitled to recover for all permanent and lasting improvements although the estate might not have been increased in value to an amount equal to the sum expended thereon.

Brotherton v. *Hetherington*, 187.

4. And where the mortgagors so entering into the agreement were merely trustees, and the person beneficially interested was cognizant of the various improvements being made, and stood by and permitted them:

Held, that neither he nor those entitled through him could be permitted to redeem without paying for such improvements. *Ib.*

5. The rule is well settled that payments made by a mortgagor to a mortgagee in ignorance of an assignment are good payments upon a mortgage against an assignee.

Gilleland v. *Wadsworth*, 547.

6. *B.* being the owner of Whiteacre, mortgaged the same to *C.*, who sold and assigned the security to *J.*, which assignment was duly registered, and afterwards *B.* agreed with *W.*, the owner of Blackacre, to effect an exchange of properties, *B.* agreeing to have the mortgage which he had executed to *C.* transferred from Whiteacre to Blackacre, which *C.* assented to, and the arrangement was finally carried out in the manner proposed, *C.* who was a solicitor, being the party employed to prepare the several conveyances, including the mortgage from *B.* to himself upon the newly acquired property (Blackacre.) No mention was made of the first mortgage by either party on this occasion, and *B.* continued to pay *C.* the interest and ultimately the principal, when he obtained a discharge of the mortgage on Blackacre; *C.* all the while continuing to pay *J.* the interest accruing due upon the mortgage on Whiteacre:

Held, (1) that the payments so made by *B.* to *C.* had the effect of discharging the mortgage on Whiteacre, and that the assignee thereof could not enforce it against *W.*; and (2) that *W.* and *B.* were not affected with notice of the transfer of the mortgage by reason of the registration thereof. *Ib.*

7. In such a case the fact of registration was not set up by the bill, and the Court at the hearing, considering that an amendment for the purpose would not be in furtherance of justice, refused the plaintiff liberty to make the necessary amendment. *Ib.*

8. A bill to enforce payment of a mortgage after the death of the mortgagee, where his estate remains interested therein, must be filed by the executor or other personal representative; his widow (as such) has no right to file such a bill.

Garrett v. *Saunders*, 566.

9. Where a bill stated that "*H.*, the widow of the said *C.* (the mortgagee), and the person entitled by law to receive the moneys secured by said mortgage, exhibited her bill of complaint:"

Held, bad on demurrer, as not shewing with sufficient distinctness how she was entitled. *Ib.*

10. A mortgagor having become insolvent, his assignee sold the equity of redemption:

Held, that the purchaser was not bound to make good any deficiency on a sale to realize the security.

Nicholls v. *Watson*, 606.

11. The rule of equity which allows the holder of several mortgages created by the same mortgagor on separate properties to

consolidate the debts and insist on being redeemed in respect of all before releasing any one of his securities is not "tacking," and is not such a claim as the Registry Act declares shall not be allowed to prevail against the provisions thereof.

Dominion Savings & Investment Society of London v. *Kittridge*, 631.

12. Although in such case the holder has the right of refusing to be so redeemed in respect of one of the securities, yet he may by his acts deprive himself of this advantage. *Ib.*

13. The plaintiffs were mortgagees of lots 27 and 29, created by the same person, and *K.* being about to purchase the equity of redemption in 29 wrote to the secretary to ascertain the amount due thereon, adding, "How is it made up, as I would like to take it up?" The answer was, "$741 will pay off * * * loan on lot No. 29 * * * if paid before 1st February, 1875." Subsequently *K.* enclosed to the Secretary his cheek for first instalment saying, "I wish to pay your mortgage on this property, or pay it up and take assignment at some future time if necessary, as I hold the second mortgage on it, and make this payment on that condition," which the secretary acknowledged the receipt of as "first instalment, interest and costs on *J. S L.'s* first loan."

Held, that under the circumstances the company were precluded from afterwards insisting on their right to be paid the amount secured on lot 27 before releasing lot 29 to the injury of *K.*, who had subsequently purchased the equity of redemption; and this although at the time of making such inquiry *K.* was aware of the mortgage on lot 27, and had dealt with the mortgagor in respect thereof by accepting a second mortgage. *Ib.*

See also "Costs," 3.
"Dower," 1, 2.
"Solicitor and client," 1, 2.

MORTGAGE BY RAILWAY COMPANY.

See "Railway Company," 1, 2.

MORTGAGING PROPERTY INSURED.

See "Fire Insurance," 2.

MORTMAIN.

Held—(Affirming the decree of Blake, V. C., as reported ante volume xxii., page 203,)—that the Statute of Mortmain, 9 Geo. II., ch. 36, is in force in this Province, and that a bequest to the

Town of Whitby, "for the purpose of establishing and maintaining, in the said town of Whitby, a public library and mechanics' institute, to be dedicated to, and be under the control of the said corporation of the said town of Whitby," and which bequest could only be paid out of moneys arising from the sale of lands or mortgages on lands, was void, under the Act, as a charitable bequest.

Corporation of Whitby v. *Liscombe*, 1.

MUNICIPAL COUNCILLORS.

A ratepayer filed a bill in September, 1871, complaining of certain acts of the treasurer and certain township councillors, done by them in the years 1867, 1868, 1869, and 1870, some of them under by-laws which the bill charged to be illegal, but which until the filing of this bill had never been objected to by anyone. Amongst other acts complained of the bill charged that the defendants had loaned the funds of the township upon improper and insufficient securities. After the bill was filed, the moneys so loaned were all repaid, together with the interest, and the evidence in the Master's office established that these loans were the only instances of misapplication of the funds of the municipality. The Court, in view of the fact that the by-laws had never been moved against; that the defendants had not received any benefit under them peculiar to themselves, and they had not been guilty of any fraud or impropriety in passing them, but, on the contrary, had acted with ordinary care and good faith, refused to make them answerable for the moneys expended under such by-laws, and directed the plaintiff to pay the defendants their costs of suit, less the sum of $150; which amount was to be borne one-half by the treasurer, the other half by the township councillors; as, on account of the nature of the questions in which the plaintiff had succeeded against them, the Court could not absolve them from paying any portion of the costs,

Baxter v. *Kerr*, 367.

See also, "Town Councillors."

NEXT OF KIN.

See "Guardian of Infants," 2.

NOTICE.

See "Mortgage," &c., 6.
"Registered Title."

NOTICE OF DEFECT IN TITLE.

See "Vendor and Purchaser," 1, 3.

NOTICE OF LOSS.

See "Fire Insurance," 5.

NOTICE TO INTENDED PARTNER.

See "Vendor and Purchaser," 3.

NUISANCE.

1. Although the fact that a nuisance has commenced will raise a presumption that the same will continue, still, where it was alleged that the nuisance complained of was caused by the discharge of refuse matter from the manufactories of the defendants, and it was shewn that no such refuse matter had been discharged by them for upwards of a year, they having closed down their manufactories during that period, and that if the nuisance was increasing at all it was not through the act of the defendants, The Court refused an interlocutory injunction restraining the further continuance of such nuisance.

Swan v. *Adams*, 220.

2. *P.* granted permission to *W.*, an adjoining owner, to dig a drain partly on his land for the purpose of draining a pit on the lands of *W.* which had been in use for some years, and which it was alleged had created a nuisance.

Held, that *P.*, after having granted the permission and lying by so long was not in a position to obtain an interlocutory injunction restraining such nuisance, unless he could shew that the nuisance had increased of late beyond what it formerly was. *Ib.*

OCCUPATION RENT.

A person who does not occupy, and has no power to lease, cannot be charged an occupation rent.

The Edinburgh Life Insurance Co. v. *Allen*, 230.

ONUS OF PROOF.

See "Quieting Titles' Act," 2.

OVER-VALUATION OF INSURED PROPERTY.

See "Fire Insurance," 4.

PAROL EVIDENCE.

[CONTROLLING DEED.]

See "Fraudulent Assignment," 1.

PARTIES.

1. Where a bill was filed to restrain one of the chartered banks of the Province from purchasing from the Water Commissioners of the City of Toronto $900,000 of debentures issued by the city:

Held, that the Water Commissioners were necessary parties to the suit.

Jones v. *The Imperial Bank of Canada*, 262.

2. The Mayor of Cobourg was *ex officio* a member of the commissioners of the Cobourg town trust when certain acts complained of were done, but ceased to be such before the institution of a suit by a party injured by such acts to be relieved in respect thereof.

Held, notwithstanding that he was a proper party to the bill.

Standly v. *Perry*, 507.

See also "Church, Bill by Trust
"Pleading," 2.
"Substantial interest."

PARTITION.

See "Infants' Estate."

PATENT OF INVENTION.

1. Though the number of mechanical powers are limited, their combinations may be very numerous; and a new combination of previously known implements or elements is the proper subject of a patent.

Patric v. *Sylvester*, 573.

2. To invalidate a patent on the ground that the subject thereof was in public use in any of the Provinces of the Dominion, for more than a year prior to the application of the inventor for a patent, such use need not be shewn to have been with the consent of the inventor; but, to invalidate a patent on the ground that the subject was on sale in any of such provinces for that time, it must be shewn to have been so on sale with the consent or

allowance of the inventor; in this respect sec. 6 and sub-sec. 2 of sec. 32 of the Act of 1872, (35 Vic. ch. 26) correspond in their provisions. *Ib.*

3. An inventor had in 1869 obtained a patent in the Province of New Brunswick—which in April, 1873, was extended over the whole Dominion under the Patent Act of 1872—but which proved inoperative by reason of an unintentional defect or insufficiency in the description and specification, and the inventor having surrendered that patent, obtained one from the Dominion Government in 1874, in accordance with an amended description and specification, for the unexpired term of the one so surrendered; *Held*, that the prior user of the invention so patented in New Brunswick (and extended) was not such a user as invalidated the patent of 1874. *Ib.*

4. The plaintiff obtained a patent for "a new and useful improvement in seed drills," which was particularly described in the specification attached to the patent. Subsequently the defendant procured a patent to be granted to him for "Sylvester's Improved Spring Hoe," which he made and attached to seeding machines. The plaintiff, claiming that the machines manufactured by the defendant, were substantially the same as those plaintiff had obtained his patent for, sought to restrain their further manufacture by the defendant, and on the hearing, the evidence shewed that the machines were substantially the same, with colourable deviations only—the chief one being the mode of attaching certain pivot connections or bars forming what are known as toggle or elbow joints, which the plaintiff attached below the junction of the draw bar with the tubes or hoes, while the defendant attached his above; the power thus operating by compression on the defendant's bars and by tension on those of the plaintiff, and in both by tension on a gutta percha spring. The court, being satisfied that the difference was only one of mechanical arrangement or a mere substitution of mechanical equivalents. and not a difference in principle of the invention, granted the relief prayed and ordered the defendant to pay the costs of the litigation. *Ib.*

PAYMENTS ON MORTGAGE.

See "Mortgage," 6.

PERSONAL REPRESENTATIVE.

Where an action is brought against the personal representative of a testator or intestate, the estate, as an estate, is bound by the result of the action brought, just as the deceased would have been

bound if in his lifetime it had been prosecuted against himself; and the judgment stands at law as conclusive against all the property of the deceased, whether it be ultimately realized out of the goods or lands; as against the heirs, however, it is only *prima facie* evidence.

Eccles v. *Lowry*, 167.

Where, in an action at law upon the covenant of the intestate against his administrator, judgment had been entered in favour of the plaintiff, who subsequently proceeded in this Court to realize his judgment, the Court *held* that it was not necessary for him to give any evidence as to the consideration upon which the judgment was founded; and the defendants, the heirs-at-law, having refrained from calling witnesses to impeach the judgment, resting on their objection that the plaintiff was bound to give evidence of the *bona fides* of the judgment, in consequence of which a decree was pronounced against them, the Court on rehearing ordered a new hearing to take place with a view to affording the defendants an opportunity of disputing the validity of the judgment, upon payment by them of the costs of the hearing and rehearing. *Ib.*

PLEADING.

1. It is unfair for a plaintiff to file a bill making grave charges against the defendant unless they are put upon the record in such a shape as will enable the defendant to meet them by answer, instead of driving him to the unsatisfactory course of defeating them by demurrer.

McMurray v. *Northern Railway Company*, 134.

2. The county of Simcoe had, under a by-law, passed in pursuance of 35 Vic. ch. 66 sec. 15, issued debentures to the amount of $300,000 to aid in the construction of the Hamilton and Northwestern Railway (see ante vol. xx., p. 211), but by reason of the neglect of the company to commence the construction of the railway within the time limited, their charter had become forfeited, and the by-law under which the debentures had been issued had therefore become void and of no effect, whereupon one of the townships which had joined in the petition for the passing of the by-law, filed a bill against the railway, the county and trustees of the debentures, seeking to restrain the trustees from selling or parting with the debentures and to have the same handed back to the county.

Held, on demurrer by the county (1.) That the township had no interest to mainiain such a suit, and (2) that the corporation of the county was the proper party to institute proceedings.

West Gwillimbury v. *Hamilton and North Western Railway Company*, 383.

3. Where a defendant declines to admit, by stating he "does not know or admit the truth" of certain facts alleged in the bill, it is incumbent on the plaintiff to prove such allegations, as by declining to admit the defendant in effect denies them, and, if he desires to do so, may give evidence at the hearing in support of such denial; therefore, where the object of a bill was to restrain the infringement of a patent which the plaintiff alleged was for "a new and useful improvement," and the defendant in his answer having stated that he "did not know or admit" the truth thereof, at the hearing offered to give evidence of the want of novelty in the alleged invention of the plaintiff as a ground for invalidating his patent:

Held, that he was at liberty to do so.

Patric v. *Sylvester*, 573.

See also "Church, Bill by Trustees of."
"Mortgage," 8, 9.
"Suit transferred from Law."

POLICY OF INSURANCE.

[REFORMING.]

See "Fire Insurance," 10.

POSSESSION.

See "Registered Title."

PRACTICE.

See "Administration," 2.
"Administration of Justice Act," 2, 3.
"Church Temporalities Act," 5.
"Devise subject to a Charge."
"Insolvency."
"Interpleader Suit."
"Personal Representative."
"Pleading," 3.
"Railway Stock."
"Stated Account."
"Suit transferred from Law.

PREMIUM, RETURN OF.

See "Fire Insurance," 6.

PRESBYTERIAN CHURCH IN CANADA.

1. The Act passed for the union of the several Presbyterian Churches named therein (38 Vic. ch. 75) provides (by section 2) that any congregation in connection or communion with any of them may, at a meeting of the congregation, regularly called according to the constitution of such congregation, or the practice of the church with which it is connected determine, by a majority of the votes of those entitled to vote, not to enter the union, and in such case the congregational property of such congregation shall remain unaffected. By "The Model Constitution" of one of the churches, and by which certain congregations, who had assumed to vote themselves out of the union, were governed, such meetings are to be called by public intimation after divine service on, at least, one Sabbath ten days previous to the day of meeting, and the decisions are to be by a majority of votes of the male persons present of the full age of twenty-one who are members or adherents of the church and who reside within the bounds of the same. The meeting at which a congregation had attempted to vote itself out of the union was called on the 12th and held on the 13th, and the voting thereat was confined to the male communicants over the age of twenty-one years.

Held, that the vote was invalid, and that the congregational property was vested in the trustees for the use of the congregation of the united body.

Cowan v. *Wright*, 616.

2. In the case of another congregation such vote was taken, not at any meeting of the congregation but, by depositing votes in the collection plate for two successive Sundays.

Held, that this vote was also invalid, and the same results followed as to the property of the congregation. *Ib.*

3. Where the members of a congregation of the Presbyterian Church had attempted to vote themselves out of the union of the Churches effected by the Statute (38 Vic. ch. 75), but by reason of their irregular proceedings had failed to do so, an injunction was granted at the instance of the members of the body who had gone into the union, to restrain the dissenting portion of such congregation from interfering with their use of the church. *Ib.*

4. The Act of Union of the Presbyterian Churches (38 Vic. ch. 75) professes to deal with the college at Montreal and at Quebec and with other funds outside of the Province of Ontario.

Held, that although, in respect of these matters, the Act was *ultra vires*, this did not invalidate the whole Act. *Ib.*

PRINCIPAL AND AGENT.

In 1851 the plaintiff who had gone to reside in California, empowered his brother in Canada to sell certain lands. In 1853 the brother agreed to sell the property to *W.*, and in 1856 executed a conveyance of the property to *W.* for the alleged consideration of $1,000, and *W.* immediately re-conveyed to the brother one-half of the estate for an alleged consideration of $200. In October, 1873, the plaintiff returned to Canada, and in January following filed a bill impeaching the transactions between his brother and *W.*, and seeking to have them declared trustees of the estate for him. At the hearing the plaintiff and his brother compromised their difficulties by each taking one-half of the property conveyed to the brother. The Court in view of all the circumstances, and of the time that had elapsed since the transaction was completed, refused to set aside the conveyance to *W.*, and dismissed the plaintiff's bill with costs.

Taylor v. *Taylor*, 492.

PRIOR SALE OF PATENTED ARTICLE.

See "Patent of Invention," 2.

PRIOR USER OF PATENTED ARTICLE.

See "Patent of Invention," 2, 3.

PRIVATE INJURIES.

The Cobourg Harbour Company was authorized by statute to construct a harbour and to erect all such moles, piers, wharves, buildings, and erections useful and proper for the protection of the harbour; and for the accommodation and convenience of vessels entering the harbour, and this right was by subsequent legislation vested in the Town Council of Cobourg.

Held, that this did not authorize the Company or the Town Council in building a storehouse and fence on land formed by crib-work constructed by the Company and gradual accretions from the lake (Ontario) in front of the plaintiff's land, which went "to the water's edge," in such a manner as to prevent plaintiff having free access to the waters of the lake.

Standly v. *Perry*, 507.

PRO CONFESSO.

See "Lost Notes."

PUBLIC BUILDINGS.

See "Town Councillors," 1, 2.

PURCHASE BY TRUSTEE.

See "Trustee," &c., 2.

PURCHASE OF DEBENTURES BY A BANK.

The Imperial Bank of Canada, by virtue of its Act of Incorporation (36 Vic. ch. 74), and the provisions of the General Banking Act (34 Vic. ch. 5 D.), has a right to purchase debentures of municipalities.

Jones v. *Imperial Bank of Canada*, 262.

QUALIFICATION OF VOTERS.

See "Church Temporalities Act," 2, 6, 7.

QUIETING TITLES' ACT.

In December, 1856, the Crown granted to *D.* three lots (1, 2, and 3), in fee simple. It was shewn, however, that he held the same in trust for the joint benefit of himself and two partners, *J. M.* and *G. J.* In October, 1857, *G. J.* for an alleged consideration of £1,500 assigned all his right and title to the undivided one-third of such lands to the Bank of Upper Canada, but in reality only as security for a debt due by him to the bank. In February, 1858, *G. J.* having become involved made an assignment of all his interest in the same lands to *D. McI.* and *J. D. M.* upon trust (1) to pay costs of assignment and execution of trust, (2) to pay the trustees certain claims, (3) to pay such of the creditors of *G. J.* (other than the said bank) who should execute the deed, within thirty days after notice thereof should be mailed to them. *pari passu*, and (4) to pay the surplus, if any, to *G. J.*, several of whose creditors joined in the conveyance. In a suit brought by the bank a decree was obtained foreclosing the interest of *G. J.* and the trustees. In October, 1858, *D.* and *J. M.*, in order to save their estate for the benefit of their creditors generally, made an assignment of all their property, real and personal, including the lands in question to one *Maulson* in trust, amongst other things, to sell and apply the proceeds (1) in payment of expenses of assignment and carrying trusts into execution; (2) to retain a reasonable compensation for his own trouble; (3) to pay the registered judgment creditors of *D.* and *J. M.* according to their priorities; (4) to pay all other creditors

who should execute the assignment within two months after request in writing so to do, and who were required to accept such dividend as the residue of the estate would yield in satisfaction of their debts; (5) to pay any surplus to *D.* and *J. M.*, which instrument was duly executed by the assignors, the assignee and three creditors, but the trustee being unable to carry out the trusts, retained the title in himself. In October, 1858, and June, 1859, judgments were recovered in actions in which, with others, *D.*, *G. J.* and *J. M.* were defendants, In December, 1866, *G. J.* died. In Febrnary, 1867, and May, 1868, executions against lands were issued, under which the sheriff sold, and the petitioner became the purchaser of the three lots for $1,625 (about one-fourth their value); as to two of these lots, however, the sale was avoided in this Court (*ante* vol. xix p. 95). Thereupon, and in August, 1874, the petitioner obtained from *Maulson* a conveyance of the legal estate vested in him as trustee of the land in question (lot one), for a nominal consideration.

Held, in a proceeding under the Act for Quieting Titles, (1) that the assignments in trust of February, 1858, and October, 1858, were not void as fraudulent preferences under the 19th section of the Statute 22, Vic. ch. 96 (Con. Stat. U. C. ch. 26, sec. 18), and (2) that the trust in favour of the assignors was not such a trust as enabled the sheriff to sell under the 10th section of the Statute of Frauds: to enable him to do so the trust must be a clear and simple one for the benefit of the debtor,

Re O'Donohoe, 399.

2. In proceeding to quiet a title under the Act, the petitioner adduced evidence to prove a possessory as also a paper title to lot 24 in the "broken" concession. The contestant claimed title to lot 24 in the "first" concession, and asserted that the "broken" and "first" concession were one and the same.

Held, that the onus lay upon the contestant of proving this fact, and not upon the petitioner, who had already established a *primâ facie* title.

Re Burritt, 492.

See also "Will," 6.

RAILWAY COMPANY.

1. By the charter incorporating a railway company, the company was empowered to borrow any sums of money necessary to complete, maintain, and work the railway, and "to hypothecate, mortgage, or pledge the lands, tolls, revenues, and other property of the company for the due payment of the said sums, and the interest thereon." The company entered into a contract with one *Brooks*, for the construction of the road, *Brooks* being bound to

provide the iron for the purpose. *Brooks* thereupon entered into an agreement with *Bickford & Cameron*, who agreed to supply him with the iron necessary for the undertaking, which was to be paid for as delivered on the wharf at Belleville, by the promissory notes of *Brooks*, by which a credit of six months was to be given from the time of the several deliveries of the iron. In order to enable *Bickford & Cameron* to procure the iron, the Bank of Montreal had advanced the money necessary for the purpose, it being agreed that the bills of lading of the iron should be indorsed to the bank, and that the vendors should retain their lien until the iron was laid on the track; and *Brooks* agreed to obtain from the company an irrevocable power of attorney enabling the bank to receive certain Government and Municipal bonuses mentioned in the agreement between the parties: *Brooks* by the same instrument agreeing also to procure from the Railway Company a mortgage on the portion of the road then graded (about 44 miles) for $200,000, to be executed to an officer of the bank as collateral security for his said notes; such mortgage to form a lien on the railway as such, but not to contain any covenant for payment by the company; and it was shewn that *Brooks* had at this time done work on the road to an amount estimated at $300,000, but the company had the option of paying *pro rata* for the work as it progressed, or, of paying the whole contract price on its completion. On the power of attorney given by the company *Brooks* had indorsed a request to the company to execute the power covenanting that the granting thereof or anything contained in it should not in anywise prejudice, affect, or waive, or vary his contract with the company. A like request was indorsed on the mortgage with a similar stipulation, as to its effect on the contract, and it was proved in the cause that without obtaining such power of attorney and mortgage *Bickford & Cameron* would not have consented to supply *Brooks* with the iron.

The company accordingly, and in supposed pursuance of their charter, executed in due form such mortgage. *Bickford & Cameron* delivered the stipulated quantity of iron at Belleville, a portion of which was laid on the track, but default having been made in paying for the iron so delivered the bank sold the iron remaining on the wharf for the purpose of realizing their lien. The company had filed a bill offering to pay what was really due under the mortgage and seeking to restrain the removal of the iron, but this relief was refused, and by consent a decree was subsequently made referring it to the Master to take an account of what was due to *Bickford & Cameron* in respect of such iron. The Master found due upon the mortgage $46,841.10, the price of iron actually laid on the track and interest; and that nothing was due in respect of the iron delivered at Belleville but subsequently removed, which finding of the Master was affirmed by the Court below, *Proudfoot*, V. C., holding that though the proviso in the mortgage was in its terms wide enough to sustain the contention

of the mortgagee, yet that it must be taken in conjunction with the covenant indorsed upon it, and that the agreement, the power of attorney, and the mortgage must be read together: that so reading them, the covenants on the power of attorney and on the mortgage shewed that the company did not intend to assume any greater liability to *Bickford & Cameron* than they were under to *Brooks;* that the indorsements meant that the company should not be liable to pay more than might be coming to *Brooks*, nor until the terms on which it was to be payable were complied with; but on appeal this was reversed, this Court being of opinion that the delivery of the iron on the wharf at Belleville was sufficient to entitle the vendors to claim the price thereof. This Court, however, being of opinion that the mortgage which had been executed by the company was *ultra vires* and void, dismissed the appeal with costs, although the objection of *ultra vires* had been raised for the first time upon the appeal to this Court.

The Grand Junction Railway Company v. *Bickford.*
[*In Appeal,*] 302.

2. *Semble*, that even if the company had the power to create a mortgage for such a purpose they could do so only on the whole undertaking, and this mortgage having been given on a portion of the road only, was, therefore, void. *Ib.*

3. A Railway Company took possession of certain lots in the city of London, Ontario, under the compulory powers in their Act of incorporation, but omitted to take any steps to ascertain the amount of compensation to be paid therefor. After a delay of some years the owner of the property filed a bill to enforce payment of compensation, when the company objected to the title on the ground that prior to the company taking possession the plaintiff had disposed of the property by lottery, and the company therefore felt unsafe in settling with him, and were not aware who were the parties really entitled to compensation. It appeard in evidence that nothing had been done to validate the title of the purchasers at such lottery as directed by the Statute, (27 and 28 Vic., ch. 32). The Court, therefore, decreed a reference to inquire as to the title of the plaintiff, when, if it should appear that the plaintiff could make a good title, the Master was to settle the amount of compensation, (being the present value of the land) which was to be paid by the company to the plaintiff, together with his costs of suit.

Scanlon v. *London & Port Stanley Railway Co.*, 559.

RAILWAY STOCK.

A charging order was made against stock in a railway company to which a party was entitled, but such stock it was shewn had,

by his direction been issued to his son, so that in a suit against the father the sheriff could not dispose of it under execution. Whereupon a bill was filed against the father and son stating these facts, and charging that the son gave no consideration for the stock; that the same was issued to him to hold for the use of the father, and was so issued to defeat, hinder, and delay the plaintiffs and other creditors of the father. At the hearing no evidence was given in support of the plaintiffs' case other than the pleadings and proceedings in the suit against the father and in which such charging order had been made; but the depositions of the son, who had been examined in that suit, were not read.

Held, that as the son had not been a party to that cause he was not bound by the evidence therein, the Court, therefore, refused to make any decree against him, and as any decree against the father would not give the plaintiffs any greater benefit than they had by the charging order, dismissed the bill with costs.

Allan v. *George B. Phelps and John L. Phelps*, 395.

RECEIPT BY HUSBAND OF WIFE'S LEGACY.

See "Gift inter vivos."

RECTIFYING DEED.

See "Insolvency."

REFORMING POLICY.

See "Fire Insurance," 10.

REGISTERED TITLE.

The plaintiff's brother bought certain lands for her, and put her in possession thereof, but afterwards obtained the patent therefor in his own name, and procured incumbrances to be created thereon, which were duly registered.

Held, that the equitable interest of the plaintiff could not prevail against the title of the incumbrancers, possession not being such notice of title as will affect the right of a party claiming under a registered conveyance.

Grey v. *Ball*, 390.

Section 66 of the Registry Act of 1865, and section 68 of the Registry Act of 1868, considered and ruled upon. *Ib.*

REGISTRATION.

See "Mortgage," &c., 6, 11.

RIGHTS OF MORTGAGEE AND MORTGAGOR.

See "Mortgage," &c., 1, 2.

RIGHTS OF PUBLIC.

The directors of a harbour company were empowered by the Legislature to construct, and agree with the owners and occupiers of land, upon which they might determine to cut and construct the harbour, either for the absolute purchase of the land or for the damages the owners or occupiers might be entitled to receive in respect thereof.

Held, that this did not authorize the company to shut up a public street or highway, or prevent the free use thereof by the public.

Standly v. *Perry*, 507.

SALE BY MORTGAGEE.

See "Infants' Estate."

SALE OF EQUITY OF REDEMPTION IN CHATTELS.

See "Chattels," &c.

SECURITY FOR COSTS TO BE INCURRED.

See "Solicitor and Client," 1, 2.

SEPARATE COUNSEL FOR PERSONS IN SAME INTEREST.

See "Costs," 2.

SOLICITOR AND CLIENT.

1. The clear rule of law is, that a mortgage given by a client to his solicitor to secure costs to be incurred in the future, is absolutely void as being against public policy.

Atkinson v. *Gallagher*, 201.

2. A mortgage for $1,200 was created by a third party, who was indebted to *G.*, in favour of a solicitor, as security for such

costs as he might incur in carrying on a suit for *G.* The client afterwards consented to the solicitor assigning the mortgage to an amount not to exceed $500, which was done. In a suit afterwards instituted by the assignee of the security, to enforce payment of that amount, to which the solicitor was made a defendant:

Held, (1) that the security was valid to the extent only of what was actually due to the solicitor for costs at the date of the mortgage. And the assignee having failed to notify the mortgagor of the assignment, by reason of which a sum of $530 had been by the client allowed to be paid to the solicitor:

Held, (2) that the assignee could only recover what might be found due in respect of such costs over and above the amount so paid to the solicitor. *Ib.*

SOLICITOR ACTING FOR BOTH VENDOR AND PURCHASER.

See "Vendor and Purchaser," 2.

STATED ACCOUNT.

A stated account set up in the answer may be insisted on in the Master's office, although no evidence was given of it at the hearing; being a matter of account which under the General Orders the Master has a right to investigate without special reference.

The Edinburgh Life Assurance Co. v. *Allen*, 230.

STATUTE OF FRAUDS.

See "Quieting Titles Act," 1.

STOCK, SALE OF.

See "Chattels," &c.

SUBSTANTIAL INTEREST.

The plaintiff, in order to qualify himself to sue as a shareholder of a bank, purchased one share of the stock thereof, which he swore he paid for with his own money and bought of his own motion, for the purpose of testing the legality of a transaction into which the bank was about to enter.

Held, that this gave him a *locus standi* in Court, although the circumstances were suspicious, the rule being, that where in such a case the plaintiff is shewn to have a substantial interest the Court

will not refuse relief, although there may be room to suppose he may have other objects in view which could not be approved of.

Jones v. *The Imperial Bank of Canada*, 262.

SUIT TRANSFERRED FROM LAW.

A suit was transferred from the Queen's Bench under the Administration of Justice Act, which, on argument of a demurrer, proved to be defective for want of the assignee in insolvency as a party, there not being the necessary allegation in the plaintiff's pleadings to shew that the right of action had re-vested in the plaintiff; the Court, however, directed the cause to stand over in order to make the necessary allegation in the pleadings, or to add the assignee as a defendant,

Curtis v. *Wilson*, 215.

TACKING.

See "Mortgage," &c., 11.

TIRAGE.

See "Railway Company," 3.

TOWN COUNCILLORS.

1. This Court has not the power of restraining councillors of an incorporated village, in the due exercise of their constitutional power, from changing the site of a proposed town hall and market, although the site first selected had been acquired by the corporation for the purpose, it not being shewn that any change of circunstances had been made by parties on the faith of it, or that any corrupt or improper motive actuated the members of the council in making such change.

Little v. *Wallaceburgh*, 540.

2. A by-law to raise money wherewith to build a town hall and market approved of by the vote of the ratepayers, did not specify any site on which the buildings were to be erected :

Held, that this left the councillors unfettered in their choice of site, although at the time there was a resolution on the minutes of the council adopting a particular one, and which had been purchased by, and conveyed to the corporation for the purpose. *Ib.*

TRUSTEE FOR SALE.

See "Trusts," &c., 3, 4.

TRUSTS, TRUSTEE, AND CESTUI QUE TRUST.

1. Trustees being empowered to invest the moneys of the trust in the purchase of real estate, may in their discretion do so in the erection of a new building, when an increased income can be obtained thereby. It is, however, for the trustees to determine for themselves whether the circumstances are such as to justify such expenditure, and that the amount is proper.

Re Henderson's Trusts, 45.

2. The fact that a trustee when offering some of the trust lands for sale by auction, at the same time offered some of his own property, and employed the same person to bid for it that he authorized to buy in the trust property, with a view of saving it from being sold at an undervalue, will not warrant the *cestuis que trust* in calling upon the trustee to perfect the purchase made by his agent of the trust estate.

Heron v. *Moffatt*, 196.

3. A trustee of lands authorized (*ante* vol. xviii. p. 426,) to sell, and, amongst other things, to retain and pay sums due and owing to himself by the settlor, and to pay the balance to the settlor, mortgaged his interest to the plaintiff, giving covenants for title and further assurance ; and then by arrangement with the settlor the trustee was to be entitled to pay himself and his partners for goods and advances made after the mortgage, and the trustee afterwards becoming entitled to the whole partnership estate, it was *held*, that the further charge enured to the benefit of the mortgagee.

The Edinburgh Life Assurance Co. v. *Allen*, 230.

4. A trustee for sale having made several agreements for sales, which were rendered abortive by the refusal of the widow of the settlor to bar her dower : *Held*, that the trustee was not liable for deterioration of the property, the decrease in value not having occurred through any default of his. *Ib.*

5. Although there may be a trust for conversion the beneficiaries may, if absolutely entitled, elect to take the property in its actual estate.

Crawford v. *Lundy*, 244.

6. In February, 1858, *S. & B.* and *E. B.* became accommodation indorsers for *A. B.* for the sum of $15,000 : *E. B.* alone indorsed for an additional sum of $5,000, *A. B.* giving a chattel mortgage on his personal effects including certain bills, notes and overdue accounts, as security against their liability as indorsers ; at the same time *E. B.* executed to *S. & B.* a mortgage on his farm to secure them to the extent of $5,000 or so much as might

remain unpaid of such $15,000 after applying the proceeds of the chattel property so mortgaged in payment thereof. In July following *A. B.* executed another indenture or trust deed, reciting such mortgage, and he thereby assigned all outstanding debts due or owing to him, including all bills, notes, *judgments*, and book accounts, to enable the indorsers "to pay, satisfy, and discharge the said accommodation paper so indorsed by them as aforesaid." In 1862, the witnesses, who had the management of the securities, had reduced the $20,000 indebtedness to about $6,900 when *E. B.'s* farm was sold, and the sum of $5,000 secured thereon was paid to the banks, who held the accommodation paper, thus reducing the claim of the banks to $1,900 for which they accepted the composition notes of *S. & B.* at 8*s.* 9*d.* in the £, they having about this time made a composition with their creditors. Nearly all of these composition notes *S. & B.* subsequently paid. Sometime afterwards and before default in payment of any of the composition notes *S. & B.* became insolvent, an assignee of their estate was duly appointed, and the banks proved upon their estate for the unpaid composition notes. About a month afterwards *A. B.* became insolvent, and at the time of the present proceedings *E. B.* had also become insolvent. Amongst the effects so assigned by the deed of July was a judgment against the defendants, The Railway Company, recovered against them by *A. B.*, which, together with one recovered against the Company in the names of *S. & B.* and *E. B.* was compromised at $1,500.

Held, that the deeds of assignment did not create a trust of the moneys received upon such compromise in favour of the banks; and that under the rule in *ex parte Waring* (*a*) their only right was to rank upon the estate of *S. & B.* for the composition notes remaining in their hands.

Allchin v. *Buffalo and Lake Huron R. W. Co.*, 411.

See also "Principal and Agent."
"Quieting Titles' Act," 1.
"Will," &c., 1, 2.

UBERRIMA FIDES.

See "Fire Insurance," 10.

ULTRA VIRES.

See "Presbyterian Church in Canada," 4.
"Purchase of Debentures by a Bank."
"Railway Company," 1.

(*a*) 19 Ves. 345.

UNDUE INFLUENCE.

The plaintiff, an infirm man, 75 years old, and nearly deaf, having quarrelled with a son in whose house he had for some time resided, conveyed by deeds, which did not contain any power of revocation, all his property and effects, worth about $6,000, to another son, the defendant, with whom he went to live, the plaintiff receiving back at the suggestion of the person employed by the father to prepare the deeds, a bond in $2,000 penalty, securing to the father a maintenance or $125 a year, in the event of his being unable to continue to reside with the defendant, but which did not charge the amount on the realty in any way. On a bill filed by the father to be relieved from the transaction so entered into, the Court, on the ground of the extreme improvidence of the bargain, and that the instruments did not, as the plaintiff swore, carry out his real intention, set the transaction aside; but the bill having improperly charged the defendant with having fraudulently practised upon the plaintiff, and with having, by undue influence, procured the deeds to be executed, this relief was granted without costs.

Watson v. *Watson* 70.

UNION, VOTING OUT OF.

See "Presbyterian Church in Canada," 1, 2.

VALUATION FOR PURPOSES OF INSURANCE.

See "Fire Insurance," 4.

VENDOR AND PURCHASER.

1. Though the rule of the Court is, that notice to the solicitor of a purchaser is notice to the client of any question affecting the validity of the title, this does not apply where the information he obtains from the vendor is such as it may be said shews that the vendor and solicitor were conspiring together to effect a fraud; therefore, where the same solicitor acted for the vendor and purchaser on the sale of the property, and it was shewn that the vendor had previously told the solicitor that he desired to sell his property in order to avoid paying certain demands against him.

Held, that this was a case in which the Court would not impute to the client (the purchaser) knowledge which his solicitor possessed.

Driffill v. *Goodwin*, 431.

2. In such a case the duty of the solicitor clearly is to refuse to be a party to any arrangement whereby the vendor intends to cheat his creditors; but if unable to do this he should not act for the purchaser, whom he thus places in a position of peril; and in no case, unless when necessity compels him to do so, should a solicitor act for both vendor and purchaser in the purchase and sale of property. *Ib.*

3. *M.* and *G.* were negotiating for the formation of a partnership to be carried on in respect of premises which *G.* was negotiating for the purchase of, during the pendency of which and on the day before the purchase was completed *M.* was informed that the object of the vendor in disposing of this property was to defraud his creditors, but which information *M.* did not communicate to *G.*

Held, that this was not sufficient to affect *G.* with notice; although on the completion of the purchase *M.* might have some rights against *G.* in respect of the property so purchased. *Ib.*

VESTED INTERESTS.

See "Will," &c., 9.

VOTES OF WOMEN.

See "Church Temporalities Act," 3, 8.

WAREHOUSING COMPANY.

See "Chattels," &c.

WILL.

1. A testator directed that until the period of distribution the rents and profits accruing from certain property devised to the children of his son should be given and applied by his executors towards the support and maintenance of the said children, if his executors should think proper; and if not, to be by his said executors invested or otherwise disposed of by them to the best advantage for the said children, at the discretion of the said executors.

Held, that under this direction the executors were justified in applying the money to the purchase of a piece of land adjoining other land which went to the children, in order to the preservation of a mill site or privilege situate on the lands so going to the children; and also in building a house upon the lands devised,

intended for the residence of the son and his children; and the fact that on a re-sale of the land, the same, owing to the great depreciation in the value of real estate, sold for about one-fifth of the sum paid by the executors for it, did not constitute the purchase a breach of trust, or render the executors liable to make good the loss.

Smith v. *Smith.* [*In Appeal,*] 114.

2. The same testator gave power to his executors to sell and dispose of any of his land, and to invest the proceeds of such sale for the use and benefit of the said children, provided the said executors should consider it to be to the advantage of the children aforesaid to do so.

Held, by the Court of Appeal, (1) that this fund also might properly be invested by the executors in buying the land and in the construction of the dwelling (SPRAGGE, C., *diss.*); and (2) that any question as to part of the purchase money which they had received being used in such building had been put an end to in consequence of such children, after they had come of age, having as found by the Master, precluded themselves by their acts from charging the expenditure to have been a breach of trust; (SPRAGGE, C., *dubitante.*) *Ib.*

3. The testator devised his land to his son, an only child, for ever, his wife to have it as long as she lived or remained his widow, and then proceeded: "And if my son die and she marry, all to come to my brothers and sisters equal share alike." The widow married during the lifetime of the son, who subsequently, without ever having married, died intestate.

Held, that the widow took the property as heir of the son.

Snell v. *Davis,* 132.

4. A testator out of the proceeds of his real and personal estate gave to one son $200, to another, $100, and to the third $1,800, the balance to be equally divided between his daughters, six in number, naming them. By a codicil he revoked the bequest to the second named son of $100, and gave an additional sum of $100 to the first named son. The household furniture to be equally divided between his two daughters last named in the will.

Held, that these legacies were specific and not merely demonstrative and if the fund was insufficient to pay them all, they must abate proportionately.

Bleeker v. *White,* 163.

5. A testator bequeathed an annuity of £50 to his wife and another of £40 to his daughter, and after other bequests and devises he proceeded: "I give, devise, and bequeath to my executors hereinafter named, their heirs and assigns forever, the

[naming certain lands in Chinguacousy and a house and lot in Clinton], upon trust for the benefit of the several devisees hereinbefore and hereinafter mentioned. First, to sell and absolutely dispose of my said village lot and house in Clinton, and invest the proceeds for the benefit of my four grandchildren hereinafter named: also, to collect the balance due upon a certain mortgage made by one *Joseph Curley* and wife, and invest the same for the benefit of my said grandchildren. Second, to lease the said lots or farms [in Chinguacousy], and to keep the same leased out forever, and the said lands in no case to be sold or mortgaged; the rental of the said farms, after paying therecut the said annuities of £40 and £50 to my daughter and to my wife as hereinbefore provided, to be held in trust by my said executors for the benefit of my four grandchildren hereinafter named and to be invested for the said grandchildren and allowed to accumulate for the period of twelve years from the day of my decease, and then to be paid over to the devisees entitled thereto and thereafter to become payable to said devisees annually. I give, devise and bequeath unto my grandchildren [naming them] the rentals issuing out of the said farms in Chinguacousy; the moneys arising out of the sale of my house and lot in Clinton, and the balance due or to grow due on the mortgage made by *Curley* and his wife to me, in equal parts, share and share alike." The will contained a residuary clause, as follows: "I give, devise, and bequeath to my executors hereinafter named all the rest, residue, and remainder of my real and personal estate, to be by them turned into cash and invested for the benefit of my said grandchildren hereinbefore named, subject, however, to the maintenance and support of my wife and daughter *Sarah* for one year from the day of my decease, without reference to and over and above and beyond any provision hereinbefore made for them or either of them."

Held (1) that the widow and daughter were not entitled to any estate in the lands in Chinguacousy; and that the executors held the same as trustees, subject to the said annuities, for the benefit of the four grandchildren in fee, who had a right to call upon the trustees to convey in such manner as they saw fit. (2) That the power given by the will "to keep the same leased out forever," must necessarily terminate when the *cestuis que trust* were in a position to call for a conveyance, otherwise it would be void. (3) That the charge of the annuities on these lands did not necessarily imply a power to sell, and in this case it was clear it did not, as the testator expressly prohibited selling or mortgaging, which prohibition was a qualification of the powers of the trustees only, and did not apply to the equitable estate in fee of the grandchildren, as in that case it would be repugnant and void.

Crawford v. *Lundy*, 244.

6. A testator who died in 1834, devised certain lands to his wife for life, and after her death to "his children, sons and daughters, their heirs and assigns for ever; to be equally divided among them, to share and share alike, after the said premises shall have been valued or appraised by two respectable and disinterested persons to be chosen by my executors hereinafter named, and after such valuation, I give, and it is my desire that the preference of the aforesaid premises shall be to the eldest of my sons, and should he not wish to take it, then to the next eldest, and so on until the youngest—for it is my most sincere desire that the paternal farm shall not be sold to any strangers—that after the valuation of the said premises, whomsoever of my sons who takes the possession shall and will well and truly pay to all my children their respective shares, to commence one year after my decease, and so on until they are all paid, beginning with the eldest and finishing with the youngest * * * And whoever of my sons which will possess the farm aforesaid or paternal farm, shall or will pay or cause to be paid to each of his sisters which are now living the full sum of £25 currency, in good and merchantable produce."

After making certain other specific devises and bequests the will concluded, "I do hereby give full power and authority to my executors hereinafter named, to convey [and] execute any deed or other necessary writings, for giving or granting any lands to my sons which I have heretofore mentioned."

By a codicil to the will the testator bequeathed to each of his daughters who should be living at his decease, and to a grandchild, the sum of £75, to be paid before the general division should take place between all his children as stated in the will.

The testator named his wife and his son, *L.*, executrix and executor to his will. The widow died in 1839, and in the autumn of that year *L.* nominated two persons to appraise the land, and in compliance with such direction a valuation was then made, and one of the sons (*A.*) having accepted the offer of the land as directed by the will, immediately thereupon agreed to sell, and did sell the same to *L.* and another brother, who subsequently assigned or released his intsrest to *L.*, and *L.* in the spring of 1840 went into possession, paid most if not all of his brothers and sisters their shares, and remained in undisturbed possession until 1874, when he sold and conveyed to *C.*, who, in 1875, filed a petition for the purpose of quieting his title under the Act.

Held, (1.) that the acceptance by *A.* of the land according to the provisions of the will must be considered as a purchase by him under the scheme detailed in the will, and that it was not nominal and his brothers substituted for him; (2) that the direction to convert the real estate did not give the land the character of personalty till actually turned into money, and that the effect of the will was to create an express trust of the proceeds for the legatees; (3) that even if the effect of the will was to constitute

the son taking the land an express trustee thereof for the brothers and sisters, the conduct of the beneficiaries in lying by so many years, receiving payment from the brother, and in other ways recognizing his right to the estate, and allowing him without objection to deal with it was such as to preclude them from now asserting any claim, even although the Statute of Limitations did not apply; but that (5) the facts stated shewed an actual sale by *A.* to his brothers in 1839, and then the Statute of Limitations began to run; (6) that the power of appointing persons to value the estate given by the will to the executors was not an arbitrary power depending on personal confidence, and that it was properly exercised by the surviving executor; (7) that the legacies given by the codicil did not form a charge upon the lands; and (8), that the circumstances were such as warranted the Court in quieting the title under the Act, without requiring the applicant to file a bill for the purpose of litigating the matters in question or obtaining the opinion of a jury thereon. *Quære*, in whom did the legal estate vest under the will? *Semble*, that it did not pass to all the children.

Re Curry, 277.

7. In proceeding to quiet a title the evidence established that in 1850 *L.* made a conveyance to one of his brothers of certain land, not that in question, in which he described himself as surviving executor and trustee of his late father, as he was in fact.

Held, that this was not sufficient to render him liable as trustee for the contestants—his brothers and sisters, and those claiming under them—and he could not in any view be considered a trustee of the land for his brothers and sisters, and that in the absence of any proof of fraud the Court would not, after so great a lapse of time open up the family arrangements on the ground of mere inadequacy of value. *Ib.*

8. A testator by his will bequeathed certain legacies of different amounts to his sons and daughters, and directed his "real and personal property" to be sold by auction, and then added "And the household furniture also to be sold by auction, and the proceeds of the sale to be equally divided amongst my daughters."

Held, that the legacies to the sons and daughters were payable out of the mixed fund of real and personal estate.

In re Gilchrist—Bohn v. *Fyfe*, 524.

9. A testator devised and bequeathed his real and personal estate upon trust for the benefit of his wife and children in certain proportions, and directed that in case of any of his children dying, leaving issue, his or her share should be equally divided amongst such issue or should be divided by the will of such child so dying leaving issue as to such child might seem meet so soon

as such issue should attain the full age of twenty-one years; but in default of any of the issue of his children attaining 21 years, then the whole of his property was to be applied to found an asylum for the blind and dumb of Toronto.

Held, that the interests of the devisees were not vested—that the children of the testator took only life interests with remainders to his grand-children, and in default of the latter attaining twenty-one, to the charity.

Re Charles—Fulton v. *Whatmough*, 610.

WORK AND LABOUR.

See "Administration," 1.

YEARLY HIRING.

See "Master and Servant."